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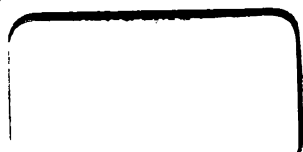
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DECIDED IN THE

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OF THE SEVERAL STATES.

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By A. C. FREEMAN.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SIMS v. STATE.

[189 Ala. 74, 86 South. 188.]

HOMICIDE—Expert Evidence as to Character of Wound.—A physician who attended the deceased after he had received the wound which caused his death, is competent to state his opinion as to whether or not the wound was fatal. (p. 18.)

HOMICIDE—Evidence of Dying Declarations.—Oral evidence may be received of dying declarations made by the deceased and reduced to writing, but not signed by him. (p. 18.)

EVIDENCE—Dying Declarations.—To render dying declarations admissible, it is only necessary that they be made after the infliction of a mortal wound, and after hope of recovery was abandoned by the declarant, and after he realized his impending death. (pp. 18, 19.)

EVIDENCE—Dying Declarations of a deceased made and written when he has not lost all hope of recovery, but reaffirmed by him as true and correct, after he realized his impending death, and while he was in full possession of his mental faculties, are admissible in evidence, although not read over to the declarant at the time he reaffirmed their correctness. (p. 19.)

EVIDENCE of Absent Witness.—The testimony of a witness given at a preliminary examination, with opportunity for cross-examination, is not admissible upon the subsequent trial merely upon proof of the absence of the witness from the state. To make such testimony admissible it must be shown that the witness is either a nonresident or permanently absent from the state, or that he is absent such a length of time as to make his return contingent and uncertain. (p. 19.)

HOMICIDE—Evidence that Deceased Carried Weapon.—On a murder trial, it is not competent to prove by a witness other than the accused that the deceased was in the habit of carrying a pistol, unless such fact is traced to the knowledge of the accused. (p. 20.)

EVIDENCE—Dying Declarations.—What weight should be given to dying declarations is for the determination of the jury alone. (p. 20.)

Knox, Bowie & Dixon and Lackey & Bowling, for the appellant.

M. Wilson, attorney general, for the state.

⁷⁷ TYSON, J. The matters presented for review by record in the case involve rulings by the trial court upon the mission and exclusion of evidence and the refusal of certain written charges requested by the defendant. Proceeding to consider the exceptions taken to the admission of evidence, the first of these relates to the testimony of the physician who attended the deceased after he had received the wound which caused his death in which the witness was permitted to state in his opinion that the wound was fatal. There was no error in this: *Simon v. State*, 108 Ala. 27, 18 South. 731; *Page v. State*, 61 Ala. 16.

Assuming for the purposes in hand that the dying declarations which were reduced to writing, but not signed by the declarant, were not lost, but actually in the possession of the prosecuting attorney, the objection taken to the oral proof of them because of the writing is without merit: *Kelley v. State*, 52 Ala. 3; *Anderson v. State*, 79 Ala. 5; *Darby v. State*, 92 Ala. 9, 9 So. 429; *Jarvis v. State*, 138 Ala. 17, 34 South. 1025. The defendant relies upon *Boulden v. State*, 102 Ala. 78, 15 South. 341, supporting his objection. It must be admitted that this case is not in accord with those cited above, if the writing evidencing the declarations was not signed by the declarant, which fact was not shown either in the statement of the facts by the reporter or by the learned judge in his opinion. If such was the fact, the decision is wrong, and we must decline to follow it. We are prepared to concede its correctness if the fact was that the declarant signed the writing.

Two other objections were interposed to the admission of dying declarations as testified to by some of the witnesses examined on behalf of the state. They were these: 1. It did not appear that the declarant was conscious of his condition, and was entirely without hope of recovery; 2. That it appeared he was not in a condition to make an intelligent statement.

⁷⁸ It is undoubtedly true that it is not the condition of the declarant as known to his family or his attending physician that makes his declarations admissible. "It is essential to their admissibility that, at the time when they are made, the declarant should have been in actual danger of death, that he should have had a full apprehension of his danger, and that death ensued": 1 Taylor on Evidence, 718. "It is the impressi-

impending death, and not the rapid succession of death in point of fact, which renders the testimony admissible": Pulliam v. State, 88 Ala. 3, 6 South. 840.

The evidence shows that the deceased was mortally wounded. He died within twenty-four hours after he was shot. He was told by his attending physician that death was inevitable and would soon come. It is true he seems to have had some hope of recovery the next morning after he was shot, and so expressed himself, and to have entertained that hope when his declaration was reduced to writing. However, subsequently, during the day on which his declaration was reduced to writing, his attending physician was sent for and found him in a sinking spell. Just prior to his physician's arrival, the evidence on the part of the state shows that he abandoned all hope of recovery, and so expressed himself. Indeed, only a short period of time elapsed between his statement that he could not live and the arrival of his physician to whom he almost immediately affirmed the correctness of the declarations he had previously made as to the difficulty which had been reduced to writing. In this respect, the case is strikingly similar to what occurred in Johnson's case: Johnson v. State, 102 Ala. 114, 16 South. 99. It is true there is evidence on behalf of the defendant tending in some degree to show that declarant never entertained the conviction that his wound would result fatally. So, too, there is some conflict in the testimony as to whether the declarant's mental condition was such as that he intelligently understood what he was saying when he made the declarations, and also when he reaffirmed their correctness to his physician. But these matters in respect to the question in hand were for the ⁷⁹ determination of the trial judge (Ward v. State, 78 Ala. 446), and we are unable to affirm that his findings with respect to them were erroneous. The dying declarations were properly admitted.

The testimony of G. R. Barnhill deposed to by him on the preliminary trial before the committing magistrate was erroneously admitted. No sufficient predicate was laid for its introduction. All that was shown preliminary to its introduction is that he was in the state of Texas at the time of the trial of this cause. It is not shown inferentially or otherwise that he has left the state permanently or for such an indefinite time that his return is contingent and uncertain. Non constat, he may have been simply on a visit to Texas, and expected to return to his home in Alabama within a short period of time: Thompson v. State, 106 Ala. 67, 17 South. 512; Mitchell v.

State, 114 Ala. 1, 22 South. 71; *Jacobi v. State*, 133 Ala. 1, 31 South. 158.

It cannot be assumed that upon another trial a sufficient predicate will be laid for the introduction of this testimony. We therefore, do not deem it necessary to pass upon the other objection interposed to a certain part of it. However, as to its admissibility, see *Walker v. State*, 52 Ala. 192, 194; *Sullivan v. State*, 102 Ala. 141, 142, 48 Am. St. Rep. 22, 15 South. 264.

While it is true that in the cases of *Cawley v. State*, 133 Ala. 128, 32 South. 227, *Naugher v. State*, 116 Ala. 463, 23 South. 26, and *Wiley v. State*, 99 Ala. 146, 13 South. 424, it was held that it was error not to allow the defendant to testify as tending to support his plea of self-defense that the deceased was in the habit of carrying a pistol, which fact was known to him, the cases do not go to the extent of supporting the contention that a witness other than defendant knew this fact, when such fact was not traced to defendant's knowledge. We are unwilling to extend the principle further than is declared in those cases. There was no error in the ruling on this point.

This brings us to a consideration of the written charges refused to defendant. Charge 7 is argumentative, confusing, and singles out particular portions of the testimony.

Charges 9 and 16 are so manifestly bad that it is unnecessary⁸⁰ to point specially their vices. Charge 13 invades the province of the jury. What weight should be given dying declarations is for their determination alone: *Kilgore v. State*, 74 Ala. 7; *Justice v. State*, 99 Ala. 180, 13 South. 658.

Reversed and remanded.

Dying Declarations are not required to be in any particular form. They may be oral or written; and, if written, they need not be signed. Declarations not admissible as originally made may become admissible by ratification under a sense of impending death: see the monographic note to *State v. Meyer*, 86 Am. St. Rep. 642-647.

The Admissibility of Evidence given on a former trial or preliminary examination is discussed in the monographic notes to *Cline v. State*, 61 Am. St. Rep. 873-892; *Atchison etc. R. R. Co. v. Osborn*, 91 Am. St. Rep. 192-208.

STATE v. YOUNG.

[139 Ala. 186, 36 South. 19.]

ARSON is an Offense against the possession, rather than the property itself, and one who is in possession under a lease of the building alleged to have been burned by him is not guilty of arson. (p. 21.)

H. F. Reese and B. J. Gayle, for the petitioner.

M. Wilson, attorney general, for the state.

136 DOWDELL, J. The defendant was arrested on a warrant issued by a justice of the peace on affidavit charging him with arson, and, upon preliminary hearing, was by a justice of the peace committed to jail. Upon his application to the judge of the city court of Selma he was discharged by the judge of said city court on writ of habeas corpus. From the judgment discharging the defendant the state prosecutes an appeal.

The undisputed evidence was that the defendant was in the possession and actual occupancy under a lease of the house alleged to have been burned by him. Arson at common law, as well as under the statute, is an offense against the possession rather than the property: *Heard v. State*, 81 Ala. 55, 1 South. 640; *Adams v. State*, 62 Ala. 177. The defendant was, in a sense, during the term of the lease and while in the possession and occupancy of the ¹³⁷ house, the owner. Under the above authorities, and the case of *Sullivan v. State*, 5 Stew. & P. (Ala.) 178, the judge of the city court properly discharged the defendant, and the judgment will be affirmed.

ARSON—THE CRIME OF, AND WHO MAY COMMIT.***I. What Constitutes Generally.****a. Malice, 22.****b. Burning, 23.****II. Burning Place of Imprisonment, 24.****III. Burning by Tenant, 25.****IV. Owner Burning His Own House, 26.****V. Occupation, 27.****VI. Burning by Husband or Wife, 27.****VII. Defenses, 28.****VIII. Attempts to Commit Arson, 28.**

*REFERENCE TO MONOGRAPHIC NOTE.

ARSON—What is a house within the meaning of the crime: 71 Am. St. Rep. 266-268.

I. What Constitutes Generally.

Although modified or enlarged by statute in a number of the states the generally accepted definition of arson is that it consists in the willful, malicious, and voluntary burning of the house or outhouse of another: *Mary v. State*, 24 Ark. 44, 81 Am. Dec. 60, and note 65; *People v. Myers*, 20 Cal. 76; *People v. Fong Hong*, 120 Cal. 685, 5 Pac. 265; *State v. Hand*, 1 Marv. (Del.) 545, 41 Atl. 192; *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *Commonwealth v. Barney*, 1 Cush. 478.

In a prosecution for arson the corpus delicti is not the fact alone that the building was burned, but also that it was burned by the willful and malicious act of some person criminally responsible for the act, and that it was not burned by natural or accidental cause: *Winslow v. State*, 76 Ala. 42; *Phillips v. State*, 29 Ga. 105. But part of the corpus delicti is the burning of the building, and if the fact is established by other evidence, the confession of the accused is competent to show that such burning was felonious, and that he was the criminal agent: *Winslow v. State*, 76 Ala. 42; *Sam v. State*, 33 Miss. 347.

a. *Malice* is of the essence of the crime of arson, both at common law and under the statutes: *Jesse v. State*, 28 Miss. 100; *Boone v. State* (Miss.), 33 South. 72; *State v. Mitchell*, 5 Ired. 350, 27 N. C. 350; *Thomas v. State*, 41 Tex. 27. Malice is a necessary ingredient in arson, though its presence need not be specifically proven. It will be presumed by the law from the willfulness of the act. Arson is not a crime involving any specific intent in addition to the act done. The malicious intent to burn is the only intent required, and that is necessarily implied in the act done unless some excuse, such as accident, appears: *Morris v. State*, 124 Ala. 44, 27 South. 336. If the facts are sufficient to constitute arson in all other respects, it is immaterial whether the motive be gain, revenge, or any other kind of malicious mischief: *People v. Fong Hong*, 120 Cal. 685, 53 P. 265. If the burning of the building is willful and malicious, the means used to communicate the fire thereto are immaterial, so far as the burning of the building constitutes the crime of arson: *Overstreet v. State*, 46 Ala. 30; *McDade v. People*, 29 Mich. 50; *Smith v. State*, 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219.

It is not necessary to the conviction of a person of the offense of arson that it be established that he burned the house himself, or applied the fire thereto with his own hand: *People v. Trim*, 39 Cal. 75. As one may be principal in the crime of arson who does not himself apply the torch, thus if he is present aiding or abetting, he is guilty as a principal: *State v. Squaires*, 2 Nev. 226.

Arson, under the statutes, is divided into degrees, and arson in the first degree consists of willfully and maliciously setting fire to a burning in the night-time, a dwelling-house, in which there is at

time a human being: *People v. Henderson*, 1 Park. C. C. 561; *Dick v. State*, 53 Miss. 384; *Lacy v. State*, 15 Wis. 13. Thus the burning of a building in the daytime will be punished with a less period of imprisonment than if perpetrated at night: *Hester v. State*, 17 Ga. 130; *Brightwell v. State*, 41 Ga. 482. A design to produce death is not, however, necessary to constitute the offense of arson in the first degree: *People v. Orcutt*, 1 Park. C. C. 252. Nor is it essential that the defendant should have set fire to the building with intent to destroy it: *People v. Fanshawe*, 65 Hun, 77, 19 N. Y. Supp. 865, 137 N. Y. 68, 32 N. E. 1102.

Setting fire to a building, with the malicious intent that the fire should be communicated to, and should burn, a dwelling-house situated near by, is, in law, deemed the burning of the latter, and the act constitutes the crime of arson: *Grimes v. State*, 63 Ala. 166; *Combs v. Commonwealth*, 14 Ky. Law Rep. 283, 20 S. W. 221; *Hennessey v. People*, 21 How. Pr. 239; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

b. **Burning.**—To constitute the crime of arson, either at common law or under the statutes, it is not sufficient that the fire be applied or communicated to the property in the house, or to the house itself; but such house or building, or some part thereof, must be burned, within the common-law meaning of the word "burn": *Graham v. State*, 40 Ala. 659. The burning of the house or building necessary to constitute arson must be an actual burning of the whole or some part thereof. Neither a bare intention, nor an attempt to burn, by actually setting fire to the building amounts to arson, if no part is burned. But it is not necessary that any part of the building be wholly consumed, or that the fire should have any continuance: *Mary v. State*, 24 Ark. 44, 81 Am. Dec. 60. If a house is simply scorched or smoked, and the fire is not communicated to the building, the offense of arson is not complete: *Woolsey v. State*, 30 Tex. App. 346, 17 S. W. 546.

While burning is an essential element of the crime of arson, it is not necessary that any part of the building should be actually consumed by fire: *State v. Dennin*, 32 Vt. 158; and if any part is burned willfully and maliciously, no matter how small the part may be, the crime is complete, although the fire is extinguished or goes out itself before the whole building is consumed: *Commonwealth v. Van Schauck*, 16 Mass. 105; *People v. Butler*, 16 Johns. 203; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *State v. Mitchell*, 5 Ired. 350; *State v. Babcock*, 51 Vt. 570. The building need not be consumed by fire to constitute the offense. It will be sufficient to show that a person set fire to the building to the extent that some part of it was on fire, unless it is made clearly to appear that it was accidental or was done for some object wholly different from the intention to maliciously burn up or consume the building: *Smith v.*

State, 23 Tex. App. 357, 59 Am. Rep. 774, 5 S. W. 219. To constitute arson, the least burning of the house is sufficient, as the charring the floor by fire to the depth of half an inch: *State v. Sandy Ired*, 570. Hence, if an attempt is made to burn a house by lighting a fire, and the wood of the house is charred in a single place as to destroy its fiber, the crime is complete, even if the fire is extinguished: *People v. Haggerty*, 46 Cal. 355. If a wooden partition annexed to a building is charred by fire, and in one place burnt through, it is a sufficient burning to constitute arson: *People v. Simpson*, 50 Cal. 304. If some part of the house was actually burnt so that the substance of the wood of such portion was actually burnt although not actually consumed, nor the substance and fiber of wood actually destroyed, such burning is sufficient to constitute arson: *Commonwealth v. Tucker*, 110 Mass. 403. If the building is in a appreciable degree burned or consumed, or fire is communicated to the woodwork or other inflammable materials of which the building is constructed, so that they are in some measure destroyed, and the building would probably have been wholly destroyed, if the fire had not been extinguished, the facts are sufficient to sustain a charge of arson: *State v. Spiegel*, 111 Iowa, 701, 83 N. W. 722. In one case under a statute providing that "if any person shall, in the night time, maliciously, unlawfully, and willfully burn, or cause to be burnt or destroyed, any ricks, barns, or other houses or buildings, he shall be guilty of arson, it was held that the injury, to come within the meaning of the statute, must amount, either to a total demolition of the building, or be such as unfits it for the purpose for which it was erected: *State v. De Bruhl*, 10 Rich. 23.

II. Burning Place of Imprisonment.

The cases on the question as to whether a prisoner who fires a building for the purpose of escaping therefrom is guilty of arson or not are in hopeless conflict and cannot be reconciled on any possible ground. The majority hold that though a prisoner may willfully and maliciously fire a jail, yet if it appears that his purpose was only to burn it as to make his escape therefrom with no desire or intention to burn it down or wholly consume it, it is not the willful burning of a building contemplated by the law of arson. These decisions are based upon the fact that the intent to burn the building is absent, and, in its absence, the perpetrator cannot be guilty of arson: *Wiggins v. State*, 53 Ga. 33, 21 Am. Rep. 255; *Washington v. State*, 12 Ga. 13, 13 S. E. 131; *People v. Cotteral*, 18 Johns. 115; *State v. Mitchell*, 5 Ired. 350; *Delaney v. State*, 41 Tex. 601. On the other hand, a respectable number of cases hold that, if a prisoner confined in a jail sets fire to the building, with intent only to burn a passage through which he may escape, not intending that the building should be further damaged by fire, he is guilty of arson: *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269; *Lockett v. State*, 63 Ala.

Smith v. State, 33 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219, overruling *Delaney v. State*, 41 Tex. 601, and reaffirmed in *Willie v. State*, 32 Tex. Cr. Rep. 534, 25 S. W. 123, holding that a prisoner setting fire to a calaboose in which he is confined, in order to escape, is guilty of arson. In *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269, the extreme view is taken that if a person confined in a jail, for the purpose of escape, sets fire thereto, he is guilty of arson, although he had no intent to consume the building by burning it, and although he so controlled the fire that it could not burn the building.

III. Burning by Tenant.

Undoubtedly, under the common law and under statutes which follow the common law, arson is an offense against the possession rather than against the property itself; and a tenant who is in possession and actual occupancy of the building burned, under a lease, cannot be guilty of arson in burning it: *Sullivan v. State*, 5 Stew. & P. 175; *State v. Fish*, 27 N. J. L. 323. If one burns the dwelling-house that he is lawfully occupying as a tenant, he cannot in a legal sense be guilty of arson, which consists in burning the building of another, as he, in effect, burns his own dwelling-house, and arson is a crime against the security of the dwelling-house as such, and not as property: *State v. Hannett*, 54 Vt. 83. Arson at common law is an offense against the possession rather than the property, and if the person charged with burning a building was in possession and occupancy of it as a tenant from year to year, he cannot be guilty of arson: *McNeal v. Woods*, 3 Blackf. 485. "At common law, arson is an offense against the possession, and, under that law, a person cannot be guilty of arson, in setting fire to, and burning the dwelling-house while he was in lawful possession thereof, without regard or reference to the ownership of such property": *Garrett v. State*, 109 Ind. 530, 10 N. E. 570.

Under statutes in many of the states arson is a crime against property rights as well as against the habitation. Hence a dwelling-house or other building belonging to another person may be the subject of arson, even though it is occupied by a tenant who commits the offense: *Lipchitz v. People*, 25 Colo. 261, 53 Pac. 1111; *Allen v. State*, 10 Ohio St. 287; *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435, 7 S. W. 664. The statutory offense of arson may be committed by the tenant in possession as against the owner of the estate in fee: *Kelley v. State*, 44 Tex. Cr. Rep. 188, 70 S. W. 20. This appears to be held as a result of a statute declaring that a part owner may not burn the property, the tenant and his landlord each being regarded as having an interest or ownership in the leased building: *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435, 7 S. W. 664. Under the statute a tenant may commit arson in respect to the house of his landlord occupied by himself: *State v. Moore*, 61 Mo. 276. "Were this a prosecution at common law there

might be abundant authority found to sustain the idea that the tenant could not be held guilty of arson in burning a house of which he had the occupancy. For the distinguishing characteristic of arson at common law is, that it is an offense immediately against the possession, and therefore if a tenant, however short his term, set fire to a house he occupied, it was not arson. But under our statutory provisions of arson, the offense, especially in the third degree, is directed, not at the possession, but at the property, of another, thus avoiding many of those 'unseemly niceties' as to possession, which formerly baffled prosecutions and enabled the guilty to escape. Under our statute even a tenant may be convicted of arson': *State v. Moore*, 61 Mo. 280.

IV. Owner Burning His Own House.

At common law and under the statutes of a number of the states, a person cannot be convicted of arson in setting fire to and burning his own house, of which he is the occupant, even though such burning is with malicious intent: *People v. De Winton*, 113 Cal. 403, 54 Am. St. Rep. 357, 45 Pac. 708; *Bloss v. Tobey*, 2 Pick. 320; *State v. Sarvis*, 45 S. C. 668, 55 Am. St. Rep. 806, 24 S. E. 53, 32 L. R. A. 647. The reason for this rule is that arson has always been regarded as essentially an offense against the security of the dwelling or building, rather than against the property, and the right of the owner to destroy his own dwelling or building is doubtless founded on the right which the law accords to a man of making such use of his property as he may see fit, so long as others are not injured thereby: *People v. De Winton*, 113 Cal. 403, 54 Am. St. Rep. 357, 45 Pac. 708. An occupant of a house under an adverse claim of right thereto is not guilty of arson in burning such house: *Sullivan v. State*, 5 Stew. & P. 175. It is not arson for one person to burn his own dwelling-house or other building, or to procure or demand it to be done by another, for the purpose of defrauding an insurer thereof, unless expressly made so by statute; and in the following states the statute does not make such an act arson: *Heard v. State*, 81 Ala. 55, 1 South. 640; *State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569; *Commonwealth v. Makely*, 131 Mass. 421; *Roberts v. State*, 7 Cold. 359; *State v. Sarvis*, 45 S. C. 668, 55 Am. St. Rep. 806, 24 S. E. 53, 32 L. R. A. 647. The owner of a house may be guilty of arson if he sets fire to and burns it while it is occupied by another: *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435, 7 S. W. 664; *State v. Hannett*, 54 Vt. 83; *Erskine v. Commonwealth*, 8 Gratt. 624. So if an owner burns his house while it contains the property of another, it may constitute arson: *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 437, 7 S. W. 664.

Under the statute in some of the states, the owner of a building which is the subject of arson may be and is guilty of that crime

if he maliciously fires and burns his own building. In these cases the statute makes no distinction in reference to the ownership of the building whether belonging to the accused or to a third person: *State v. Robfrischt*, 12 La. Ann. 382; *State v. Elder*, 21 La. Ann. 157; *State v. Hurd*, 51 N. H. 176; *Shepherd v. People*, 19 N. Y. 537, overruling *People v. Gates*, 15 Wend. 159; and *People v. Henderson*, 1 Park. C. C. 560; *Erskine v. Commonwealth*, 8 Gratt. 624. As has already been shown, a person who has burned, or procured someone else to burn, his own dwelling-house, with intent to defraud an insurer thereof, is not subject to an indictment for arson, unless expressly made so by statute: *State v. Sarvis*, 45 S. C. 668, 55 Am. St. Rep. 806, 24 S. E. 53, 32 L. R. A. 647. But in most of the states statutes exist which make it arson or a felony for any person to burn his own insured dwelling-house or other insured building maliciously, and with intent to defraud the insurer, or to injure him: *Martin v. State*, 28 Ala. 71; *People v. Hughes*, 29 Cal. 257; *People v. Schwartz*, 32 Cal. 160; *State v. Byrne*, 45 Conn. 273; *McDonald v. People*, 47 Ill. 533; *Commonwealth v. Goldstein*, 114 Mass. 272; *Commonwealth v. Bradford*, 126 Mass. 42; *People v. Jones*, 24 Mich. 215; *Zhou v. People*, 25 Mich. 499; *Meister v. People*, 31 Mich. 99; *Shepherd v. People*, 19 N. Y. 537; *People v. Henderson*, 1 Park. C. C. 560; *State v. Babcock*, 51 Vt. 570.

V. Occupation of the dwelling-house is an essential element of the crime of arson thereof: *Hicks v. State*, 43 Fla. 171, 29 South. 631; *Stallings v. State*, 47 Ga. 572; *State v. O'Connell*, 26 Ind. 266; *Page v. Commonwealth*, 26 Gratt. 943. If the occupant has his or her household effects or valuable articles in the dwelling-house, and is temporarily absent therefrom, and such house is burned during such temporary absence, it is the burning of an occupied dwelling-house, within the meaning of the statute, although no one was in the house at the time it was burned: *Johnson v. State*, 48 Ga. 116.

Willful burning of an unfinished house which was never occupied, though designed for a dwelling, and which was not appurtenant to any other house, is not arson: *State v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336. Thus the burning of a house which has never been occupied as a dwelling is not arson: *Commonwealth v. Barney*, 10 Cush. 478.

VI. Burning by Husband or Wife.

A husband living with his wife and having rightful possession jointly with her of a dwelling-house which she owns and they both occupy, is not guilty of arson under the common law in burning such dwelling-house, although such burning was done willfully and maliciously: *Garrett v. State*, 109 Ind. 527, 10 N. E. 570; *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302. And this rule is not changed by a statute securing to the wife her separate property: *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302. But under the statute of Indiana it has been held that if a man unlawfully, willfully, and

maliciously sets fire to and burns the dwelling-house of wherein she permits him to live with her as her husband guilty of arson, although he may have furnished the money for the house: *Garrett v. State*, 109 Ind. 527, 10 N. E. 570. Under the same statute a wife may be guilty of arson in burning her husband's barn: *Emig v. Daum*, 1 Ind. App. 146, 27 N. E. 32.

VII. Defenses.

If it is clearly made out that the firing of the building was intentional, the intention or motive of the accused is of no moment. A state of intoxication at the time of such firing is not an excuse or mitigation of the crime, but is not even to be considered in determining his capacity at the time to have a motive or intention. *People v. Jones*, 2 Edm. Sel. Cas. 86. An acquittal on a charge of setting fire to a gristmill is a good defense to a subsequent prosecution for burning its contents when both were consumed by the same fire: *State v. Colgate*, 31 Kan. 511, 47 Am. Rep. 50, 346.

VIII. Attempts to Commit Arson.

The offense of attempting to commit arson depends on the act or pose for which the fire was kindled, and if the kindling of the fire would as an inevitable result have burned the building, the intention to do so may be presumed: *People v. Long*, 2 Edm. 129. Thus one who places a lighted candle in and among grain in a barn, with intent to cause the barn to be burned, is guilty of an attempt at arson, though the candle is extinguished before any further burning takes place: *State v. Johnson*, 19 Ind. 111. If one solicits another to set fire to a barn belonging to a third person, and gives him materials for that purpose, although he does not intend to be himself present at the commission of the offense, the other never intends to commit the crime, yet the one who solicits is guilty of such act to be done is guilty of an attempt to commit arson: *People v. Bush*, 4 Hill, 133. Proof that the prisoner prepared matches and other combustibles, and placed them in his room, and intended to use them in burning a barn, promising to give the other money for doing so, is sufficient to convict him of an attempt at arson: *McDermott v. People*, 5 Park. C. C. 102. Or if one solicits another to commit arson, and promises him a reward of money therefor, and offers him matches for the purpose of kindling the fire, such person is guilty of an attempt to commit arson, though the offer is immediately repudiated: *State v. Bow*, 100 N. H. 262, 28 Am. St. Rep. 847, 14 S. E. 488, 15 L. R. A. 199. It is not necessary to a conviction for an attempted arson that any part of the building should be actually burned, and it is sufficient if the matches are applied to, or in immediate contact with, the building with intent to burn it, though such intent is not carried out: *State v. Min*, 32 Vt. 158.

MILLIKIN v. CARMICHAEL.

[139 Ala. 226, 35 South. 706.]

HOMESTEADS—Lease of—Consent of Wife.—A husband, without consent of his wife, may lease the homestead lands for purposes not interfering with the use of the property as a homestead; but he cannot do so when the lease interferes with such use. (p. 30.)

HOMESTEADS—Lease of—Consent of Wife.—A husband alone, and without the consent of his wife, may lease the premises constituting their homestead for the turpentine privileges thereon, with right of ingress and egress for the purposes of the lease. (pp. 30, 31.)

Sanders & McGriff, for the appellants.

H. A. Pearce and R. D. Crawford, for the appellees.

²²⁶ **TYSON, J.** The matter of controversy between the parties arises out of their respective claims to box and take from pine trees gum or rosin standing upon the homestead of one Franklin. The complainants predicate their right upon a written instrument of date of December 8, 1899, granting to them the right of ingress and egress upon the land for the boxing of the trees and taking from them the gum for the purpose of manufacturing ²²⁹ turpentine for a designated period of time which was executed by both Franklin and his wife and properly acknowledged by both. The acknowledgment of the wife is in the form required for conveyances of homesteads.

The respondent asserts his right under a similar instrument, executed by Franklin, the husband, alone on November 24, 1890, and recorded June 1, 1891.

From this statement it will readily be seen that the question presented is, whether the signature of the wife and her separate and apart acknowledgment is necessary to the validity of the instrument under which the respondent claims. If not, it is entirely clear that his right is superior to those of the complainants.

The statute provides that "no mortgage, deed or other conveyance of the homestead by a married man shall be valid without the voluntary signature and assent of his wife, which must be shown by her examination, separate and apart from him, before an officer authorized by law to take acknowledgments of deeds, and the certificate of such officer upon or attached to said mortgage, deed or conveyance," etc.: Code, sec. 2034. This statute simply restrains and limits the husband's power of aliena-

tion in whom the title to the homestead is vested, which is a mere incident of his ownership: *McGuire v. Van Pelt*, 55 Ala. 353. He is the owner of it, and has unlimited dominion and power over it so far as the use to which it may be put. He may cultivate it, if it is susceptible of cultivation or not as he pleases and in such manner as he may choose. He may, if it is timber land, fell the timber for the purpose of making it suitable for cultivation, or for that matter he may destroy the timber growing upon it or he may sell it after he has felled it; and this he may do although the doing of it may destroy the market value of the land. He has the undoubted right to extract from the pine trees upon it the gum or rosin without molestation or hindrance; or to take from the trees the burrs or needles for the purpose of sale or otherwise.

Should there be upon it an orchard of fruit trees, who doubts his unqualified right to gather the fruit and dispose ²³⁰ of it as he may choose? Or should minerals exist in or upon it, who can question his right to mine or dispose of them? The crops he may raise upon it are his and these he may mortgage or sell without his wife's assent. In short, being the owner, the use to which he may put the land, and everything attached to it and a part of it, is illimitable and uncontrollable.

Assuming for the purpose of this case, as seems to have been done in *Millikin v. Carmichael*, 134 Ala. 623, 92 Am. St. Rep. 45, 33 South. 9, that the instrument under which the respondent claims is a conveyance of an interest in the land (a proposition not decided), the principle that must control is found in 15 American and English Encyclopedia of Law, second edition, page 674. It is there said: "The authorities are not uniform as to the right of the husband alone to lease the homestead premises, for this right has been both affirmed and denied. The most satisfactory rule would seem to be that the husband alone may lease the homestead lands for purposes not interfering with the use of the property as a homestead, but cannot do so when the lease interferes with such possession and enjoyment of the premises by the wife."

Mr. Thompson, in his work on Homestead and Exemptions (section 471), states the same rule in this language: "But the husband may, without the consent of the wife, give leases of homestead lands which do not interfere with their use and occupancy as a homestead and also licenses to cut timber, quarry stone, remove minerals and the like," etc.: See, also, *Waples on*

Homestead and Exemptions, sec. 433; Smyth on Homestead and Exemptions, sec. 303; Harkness v. Burton, 39 Iowa, 101; Coughlin v. Coughlin, 26 Kan. 116.

Under this rule the rights of the husband as owner are fully protected and conserved and no right of the wife violated.

In the absence of averment and proof that the exercise of the privileges granted to the respondent interfere with the use and occupancy of the land as a homestead, it cannot be affirmed that it does. It is not even shown that the extracting of the gum or rosin from the trees ²³¹ deteriorates their value, much less diminishes the value of the land or otherwise impairs its value as a homestead; non constat, its value may be enhanced and its use and occupation as a homestead rendered more valuable. The case of McKenzie v. Shows, 70 Miss. 388, 35 Am. St. Rep. 654, 12 South. 336, cited by appellants, involved the validity of a conveyance by the husband of all the timber of a designated size growing on the land, no time being fixed for its removal. The question presented was whether the conveyance was an encumbrance of the homestead. The court held that growing trees are a part of the realty; that the conveyance was an encumbrance and that the wife should have joined in it. Stress was laid in the opinion upon the fact that there was a wholesale conveyance of the timber with large diminution in value of the homestead. The case of Pritchett v. Davis, 101 Ga. 236, 65 Am. St. Rep. 298, 28 S. E. 666, also cited and relied upon, is very much like the Mississippi case.

The point involved in Millikin v. Faulk, 111 Ala. 658, 20 South. 594, was whether the lease, which was of the same character as these, was an unconditional conveyance of real property within the meaning of section 1005 of the Code. It was held that it was. Neither of these cases are in point. What we have said in no wise conflicts with McGhee v. Wilson, 111 Ala. 615, 56 Am. St. Rep. 72, 20 South. 619, which holds that the conveyance of a right of way to a railroad through the homestead in which the wife does not join is void. The distinction between that case and this one is so apparent, it is unnecessary to point it out.

Affirmed.

The Lease of a Homestead by one spouse only is discussed in the monographic note to Jerdee v. Furbush, 95 Am. St. Rep. 926-928.

GRAHAM v. PARTEE.

[139 Ala. 310, 35 South. 1016.]

MORTGAGES—Estoppel.—If an owner of land executes a first and second mortgage thereon, and, upon default, there is a foreclosure by both of the mortgagees, the mortgagor is estopped to dispute the title conveyed by his second mortgage. (p. 35.)

EJECTMENT—Title Sufficient to Maintain.—A purchaser at foreclosure sale of property conveyed by a first and second mortgage shows title sufficient to maintain ejectment against the mortgagor, by introducing and proving a deed of the premises from the second mortgagee to him as purchaser at foreclosure sale. (p. 35.)

CORPORATIONS—Conveyances by Presumption from Affixing Seal.—If a corporate seal is affixed to an instrument, and the signatures of the proper corporate officers are proven, it must be presumed that such officers had the authority which they exercised. The seal itself is prima facie evidence that it was affixed by proper authority. (p. 37.)

CORPORATIONS—Instrument Sealed but not Signed—Evidence.—If the corporate seal is affixed to a corporate instrument, such seal is prima facie evidence that it was thus affixed by proper authority, and the instrument duly executed, and it is then admissible in evidence, although the corporate name is not signed thereto. (p. 38.)

W. R. Nelson and H. Nelson, for the appellant.

Burnett, Hood & Murphree, for the appellee.

311 DOWDELL, J. There is nothing in the suggestion in argument by counsel for appellees that the bill of exceptions was signed out of time. It appears from the record that the bill was signed in vacation, but within the time fixed by the order of the court. No motion was made either before or at the time of the submission of the case to strike from the bill of exceptions, what purports to be a contract executed by Emma J. and A. M. Partee for want of a sufficient identification, and the cause having been regularly submitted on the merits, the insistence in argument to strike out the contract comes too late. Moreover, it appears from the bill of exceptions that the contract as set forth was regularly introduced in evidence.

The plaintiff in support of his right to recover the possession of the land sued for, introduced in evidence, as showing title in himself, two mortgages duly executed by the defendants, the first on the twenty-first day of February, 1900, to the American Freehold Land Mortgage Company of London, Limited, and the second to the Loan Company of Alabama, on the — day of

February, ³¹² 1900. He then introduced in evidence, in order, the foreclosure proceedings had under the powers contained in the mortgages, showing the advertisement, sale, and the purchase by him at said sale, which were in all respects regular; the final affidavit of Emma J. Partee made in obtaining the loan for which the mortgage was given to secure; the receipt of the defendant for the amount of the loan; the contract of the defendants with the Loan Company of Alabama for securing for them the loan. The bill of exceptions then recites: "The plaintiff here introduced a deed executed by the American Freehold Land Mortgage Company of London, Limited, by Francis John Patton, its attorney in fact, also the Loan Company of Alabama to Benjamin Graham, executed on the 26th day of August, 1901, conveying the S. W. $\frac{1}{4}$ of Sec. 6, T. 9, south of Range 9 east of Huntsville, Meridian, and recorded," etc., following this the deed is set out. The deed is signed: "The American Freehold Land Mortgage Company of London Limited. (Seal.) by Francis John Patton, attorney in fact." "Loan Company of Alabama. (Seal.) by W. R. Nelson, President." The execution is duly attested and acknowledged. The bill of exceptions then recites: "The plaintiff then introduced a power of attorney executed by the American Freehold Land Mortgage Company of London, Limited, on the 21st day of June, 1893, by E. Brodie Hoare, W. M. Cunninghame, Directors, Ernest A. Bullock, Secretary, to Cornelius Cuyler, Benjamin Graham, and Francis John Patton in words and figures as follows, to wit." Here the power of attorney is set out, which is in the name of the American Freehold Land Mortgage Company of London, Limited, a corporation duly organized and existing under and by virtue of the laws of Great Britain, and which in terms authorizes the execution of the power confided, by any one of the grantees named therein. The testimonial clause of the power of attorney is as follows, to wit: "In witness whereof the American Freehold Land Mortgage Company of London, Limited, has caused its corporate seal to be affixed to these presents, and the same to be attested, it having no president, ³¹³ by its chairman, and also by one other of its directors, and by its secretary, at the said city of London, this the 21st day of June, in the year one thousand eight hundred and ninety-three." The names of E. Brodie Hoare, W. M. Cunninghame, directors, and Ernest A. Bullock, secretary, are subscribed to the instrument with the seal attached bearing the impress, "The American Freehold

Land Mortgage Company of London, Limited, Seal," with additional attestation by two witnesses. Accompanying and attached to the instrument is a certificate of the United States consul general at London to the sworn statement of E. Brodie Hoare, taken before the consul general, proving the official character of the parties signing the instrument, the genuineness of the seal, and that the same was affixed by the authority of the corporation; also, an acknowledgment in due form by the parties executing said instrument, taken by the United States consul general at London, England, on the twenty-first day of June, 1893. In addition to all of this, there was also attached a certificate by Ernest A. Bullock, secretary, "that the foregoing is contained in the minutes of a meeting of the board of directors held at the office of the company the twenty-first day of June, 1893. For the American Freehold Land Mortgage Company of London, Limited"—signed, Ernest A. Bullock, secretary. This instrument was duly recorded in the office of the judge of probate of Cherokee county, Alabama. The defendant objected to the introduction in evidence of the said power of attorney, and for grounds of their objection assigned the following: "1. Because the parties executing the said power of attorney showed no authority and power to execute the same; 2. Because said power was not executed by the president of the corporation; because said power was not executed by the corporation; 3. Because said power of attorney does not show that it was executed by anyone authorized to do so by the said American Freehold Land Mortgage Company of London, Limited; because the name of said corporation is not signed to said power of attorney." The court sustained the objection, and the plaintiff duly excepted to the ruling of the court. On the foregoing state³¹⁴ of the evidence as to title, the defendants not offering any, the court at the request of the defendants in writing, gave the general charge in their favor, and to which action the plaintiff excepted. The defendant's objection to evidence was confined to the power of attorney offered by the plaintiff, and on the specific grounds as stated. After the exclusion by the court of the power of attorney on defendant's objection, there was left in evidence before the jury the two mortgages executed by the defendants, the foreclosure proceedings, and the deed executed to the plaintiff under the foreclosure, which was jointly executed by the Loan Company of Alabama, by its president, with the American Freehold Land Mortgage Company. It is true that

the Loan Company mortgage is a second mortgage, and that the Freehold Land Mortgage Company mortgage is superior, but the defendants are estopped to set up the defense of superior outstanding title: *Jones on Mortgages*, 2d ed., sec. 719. The mortgagors cannot dispute the title which they conveyed by their mortgage to the Loan Company, and this title the Loan Company conveyed by its deed to the plaintiff. As showing title in the plaintiff upon which to base a recovery of the possession of the land against the defendants, mortgagors, this was sufficient: *Jones v. Reese*, 65 Ala. 134. See, also, *Lang v. Stansell*, 106 Ala. 389, 17 South. 519; *Tew v. Henderson*, 116 Ala. 545, 23 South. 128. The court erred in giving the general charge for the defendants, and should have given it for the plaintiff as requested. But as the question of the proper execution of the power of attorney by the American Freehold Land Mortgage Company to the person who executed the foreclosure deed to the plaintiff on behalf of the freehold company is now presented and will doubtless arise on another trial, we will now consider and pass upon the same. That the power of attorney as set out in the record is not the act of the individuals executing it, but that of the corporation, is, we think, quite clear. It purports on its face, both in the statement at the beginning, and in the testimonial clause, to be the act of the American Freehold Land Mortgage Company of London, Limited. The ³¹⁵ attesting clause shows also that the corporation had no such officer as a president, and that the execution was by its chairman, and one other of its directors, and by its secretary. The corporate seal is also attached and is used as the signature of the corporation. In the case of *American Savings etc. Assn. v. Smith*, 122 Ala. 505, 27 South. 920, it was said in an opinion by the present chief justice: "The testimonial to the instrument reciting that 'the said party of the first part (the Oxana Building Association) hereunto sets its hand and seal the day and year first above written by its president, B. F. Sawyer, who is fully authorized to execute this mortgage,' had the corporate seal been attached the presumption would have been that the president had the authority to execute the conveyance, and the seal itself would have been prima facie evidence that it was affixed by proper authority," citing *Thorington v. Gould*, 59 Ala. 465; *Jinwright v. Nelson*, 105 Ala. 405, 17 South. 93. In the case last above cited it was said: "When the corporate seal appears to be fixed to an instrument, and the signatures of the proper officers are

proved (which is shown in the present case), courts presume that the officers had the authority which they exercised, and a seal itself is prima facie evidence that it was affixed by authority." It is also said in this case, on page 40 Ala., and page 93, 17 South., preceding the above quotation that "the name of the corporation must be subscribed or to the conveyance, and it must be subscribed or signed by an officer of an agent having authority in writing": Citing *Stanton v. Swann*, 78 Ala. 88; *Swann v. Gaston*, 87 Ala. 569, 6 South. 886; and section 1789 of the Code of 1886, which is the same as section 982 of present Code of 1896. This last quotation is also cited in *Jinwright v. Nelson*, 105 Ala. 405, 17 South. 93, and there cited of *Standifer v. Swann*, 78 Ala. 88, and *Swann v. Gaston*, 87 Ala. 569, 6 South. 886, are relied on by the court here in support of the ruling of the court below. In *Swann v. Gaston*, 87 Ala. 569, 6 South. 886, the instrument in question was signed "by J. C. Stanton, general superintendent and attorney in fact." It does not appear that any seal of the corporation was attached. The court said: "There being no evidence of any written authority from the governing body of the corporation for which Stanton purported to act as agent, to execute the deed, it conveyed no legal title or estate to the defendant." Citing *Standifer v. Swann*, 78 Ala. 88. In this last case, 87 Ala., the instrument in question purported to be signed by the railroad company, "by J. C. Stanton, general superintendent and attorney in fact." No corporate seal was attached, as it appears from the report of the case. This court there speaking through Somerville, J.: "In this state, all conveyances for the alienation of lands are required to be written or printed on parchment or paper, and must be signed at their foot by the grantor, or contracting party, and if the conveyance is made by an agent, he is required by the statute to have 'a written authority';" citing section 2145 of the Code of 1876, which is the same as section 982 of the present Code. "It is manifest that no corporation can appoint an agent to convey lands, except by the vote of its directors, or other managing board, in whose power to sell may be reposed by charter, or by general law. The defendants have failed to produce any corporate proceedings or minutes, showing the appointment of Stanton as agent of the railroad company, with authority to sell and convey lands. This was the best and only legal evidence of such authority, and in the absence of it, the deed from Stanton would be void."

no evidence of title, but only color of title," etc. It is to be observed, that in these two cases no corporate seal was affixed to the instrument, and there was no evidence otherwise of authority in the agent. Nothing is said as to the necessity of subscribing the name of the corporation to the instrument in order to give it validity. In the case of *Savannah etc. R. R. Co. v. Lancaster*, 62 Ala. 555, the deed in the statement at the beginning purported to be by the railroad company, and the testimonial clause was as follows: "In witness whereof, the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by its president, Samuel G. Jones, and its secretary, Samuel E. Hall, in the presence of James M. Muldon and William D. Dunn, who subscribed their names thereto as witnesses on the 31st day and year first above written." Signed, "Samuel G. Jones, President (Seal)." "Samuel E. Hall, Secretary (Seal)." The name of the corporation was not subscribed or signed to the instrument. The failure to do so was urged by counsel in argument against the validity of the deed, citing the statute requiring conveyances to be signed "at the foot" by the contracting party. This court, speaking through Manning, J., said: "The sections of the code which require conveyances to be 'signed at their foot by the contracting party or his agent having a written authority, and dispense with seals to them,' cannot have been intended to embrace conveyances by corporations, which, being unable to write and have signatures of their own, have always executed such instruments by causing their seals to be affixed to them. To have a seal for such purposes has not only been the uniform usage of these bodies politic, but the right 'to use a common seal, and to alter the same at pleasure,' is expressly conceded to them by our statute." The deed was held to have been well executed. "A deed by a corporation is in proper form if expressed to be by the corporation, naming it, by their agent, naming him, and concluding, 'In witness whereof, they,' naming the company, 'by their agent, having hereunto set their seal, and the said agent hath hereunto subscribed his name': 4 Thompson's Commentaries on Corporations, sec. 5090, and note 3; *Flint v. Clinton*, 12 N. H. 430; 2 Cook on Stockholders and Corporation Law, sec. 722, p. 153, note 1. "In like manner the following was well executed, as a deed of a corporation: 'In testimony whereto, said party of the first part, have caused these presents, and their common seal to be hereto affixed. A. B., President,' and a corporate seal": Note 3 of above citation.

In *Thorington v. Gould*, 59 Ala. 468, it is said: "Courts are to presume that officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority." Our conclusion is, that the instrument creating the power of attorney, which was excluded from evidence, was sufficiently executed, and the failure to subscribe the name of the company, ³¹⁸ and this is the principal objection insisted on, did not render it inadmissible in evidence. The judgment will be reversed and the cause remanded.

The Presence of the Seal of a Corporation establishes, prima facie, that the instrument to which it is affixed is the act of the corporation, and dispenses with the necessity of any proof, on the part of the person claiming under it, that it was executed by the proper officers, that they had authority to so execute it, and that all proceedings necessary to such authority had been duly given, unless the corporation shall first have rebutted the presumption arising from the presence of the seal: See the monographic notes to *B. S. Gr. Co. v. Blodgett*, 50 Am. St. Rep. 155; *Morrison v. Wilder Gas Co.* Am. St. Rep. 264. The supreme court of Maine, however, seems to take a different view of the question: *Morrison v. Wilder Gas Co.* Me. 492, 64 Am. St. Rep. 257, 40 Atl. 542.

JONES v. McNEALY.

[139 Ala. 379, 35 South. 1022.]

DEEDS—Reformation of—Knowledge of Mistake.—If a purchaser for the reformation of a deed by a subsequent purchaser does not allege want of notice of the mistake, construing it most strongly against the complainant, such purchaser must be held to have knowledge of the mistake at the time of acquiring rights under the conveyance. (p. 40.)

DEEDS—Reformation of.—A purchaser is entitled to the grantor's right to enforce a correction of a description in a deed to a part of the premises executed by the grantor to another. (p. 40.)

DEEDS—Reformation of—Deeds of Gift.—The right to the reformation of a deed is not affected by whether it is one of bargain and sale, or of gift. (p. 40.)

DEEDS—Reformation of—Possession of Premises by the purchaser is not essential to enable him to obtain correction of a mistake in the description contained in a prior deed to a portion of the premises executed by his grantor to another. (p. 40.)

DEEDS—Reformation of Laches.—Complainant asking the reformation of a mistake in a description in a deed is not guilty of laches in bringing suit, if she has been in possession of a portion of the premises to which she has a deed ever since its execution, and her mortgagor and grantor has been in possession of the other

tion, and the bill is filed promptly after the defendant, who claims title under the deed containing the mistake, discloses his intention to disturb complainant's possession. (p. 41.)

DEEDS—Reformation of—Time of Discovery of Mistake.—A bill for the correction of a mistake in a deed need not allege when the complainant discovered the mistake, or that a demand or request has been made for its correction. (p. 41.)

DEEDS—Reformation of—Demand for.—A bill for the correction of a mistake in description in a deed need not allege a demand or request of defendant to correct it, when defendant has instituted suit in ejectment against the complainant's tenant. (p. 41.)

DEEDS—Reformation of—Relief Granted.—If a bill presents a case for the correction of a mistake in a deed, the court will grant full relief to the end of foreclosing a mortgage given by defendant to complainant on a portion of the same premises, when the evidence establishes the right to the correction. (p. 41.)

Houston & Power and G. A. Hays, for the appellant.

Barnes & Duke, for the appellee.

333 **TYSON, J.** The bill, as amended, to which the demurrer was sustained, seeks to have a certain deed executed by Mrs. Smith to her daughter, Mrs. McNealy, reformed and canceled as to a certain portion of the lot described in it and purported to be conveyed by it and to correct the description in the mortgage now held by complainant and to foreclose it, and also to enjoin certain actions of ejectment instituted by Mrs. McNealy, etc.

It proceeds, in so far as the reformation and cancellation of the deed under which Mrs. McNealy claims title to the whole lot upon two theories: 1. Upon the ground of a mutual mistake by the parties to it; and 2. In the event there was no mistake upon the ground of an estoppel in pais predicated upon the conduct of Mrs. McNealy. The right of the complainant to the relief she seeks is based upon two conveyances, one a mortgage, referred to above, acquired by transfer and the other a deed, both of which were executed by Mrs. Smith, conveying a certain portion of the lot covered by the deed previously executed by Mrs. Smith to her daughter.

A demurrer comprising eleven assignments was interposed to the bill as amended. The chancellor, it appears, 334 only regarded the first two grounds meritorious. These two practically raise the same question. They go to the entire bill and challenge the right of the complainant to relief upon the ground that it is not shown that she had no notice or knowledge of the alleged mistake in the deed from Mrs. Smith to her

daughter. It is true the bill does not allege her want of knowledge of the fact. And construing its averments strongly against the complainant, it must be taken that she knew of the mistake when she acquired her rights under conveyances she now holds. Knowing this, she also knew Mrs. Smith had the right to have her deed to her daughter reformed: *Larkins v. Biddle*, 21 Ala. 252; *Williams v. Ham*, 65 Am. St. Rep. 514, note. Having acquired Mrs. Smith's right to the part of the lot in controversy, the complainant occupies her place and is entitled to enforce that right in the matter of the misdescription. This point was raised by the demurrer to the bill in the case of *Harris v. Ivey*, 114 Ala. 363, 21 S. 422, which was filed by a purchaser, as here, to have corrected a misdescription of the lands contained in a deed, previously executed by his grantor to another. It was ruled to be without merit. These grounds of demurrer were improperly sustained. If they had been interposed solely to that phase of the bill which relies upon the estoppel in pais we are not prepared to say whether they are well taken or not. That question is not presented, and we, therefore, decline to express an opinion on it. Nor for that matter are any of the other grounds of demurrer well taken, as we shall proceed to show.

The deed from Mrs. Smith to Mrs. McNealy, her daughter, sought to be corrected, expresses the consideration of \$1000 dollars paid and for love and affection, and contains no covenant or warranty. Whether it is one of bargain and sale or of gift is immaterial, since if it be one or the other, Mrs. Smith would have had the right to have it reformed: *Larkins v. Biddle*, 21 Ala. 252; *Weathers v. Hill*, 92 Ala. 492, 9 S. 412. The third ground of demurrer is, therefore, not taken.

The title asserted by complainant being equitable, it is ³⁸ necessary for the purposes of this bill, that she should be in possession, since she has no adequate remedy at law: *Echols v. Ward*, 90 Ala. 309, 7 South. 817, and authorities there. Nor can laches be imputed to her on the facts alleged. Complainant has been in the possession of that portion of the lot to which she has a deed ever since its execution, and the grantor, Mrs. Smith, also Mrs. McNealy's grantor, has also been in the undisturbed possession of the other portion. This bill was filed promptly after Mrs. McNealy made known her intention to disturb complainant's possession. Nor is it necessary that the bill should allege when complainant disco-

the mistake in the description; or that a request or demand was made by her on the respondent, Mrs. McNealy, to correct the mistake before the bill was filed. Mrs. McNealy's attitude in the matter of instituting the suits in ejectment excluded all expectation that had a request or demand been made upon her, that she would have complied with it: *Weathers v. Hill*, 92 Ala. 492, 9 South. 412; *Harrold v. Weaver*, 72 Ala. 373.

The averments of the bill when taken in connection with the stipulations contained in the mortgage sufficiently show a maturity of the debt secured by it and a default on the part of the mortgagor that entitles complainant to have it foreclosed. What we have said disposes of those assignments of demurrer interposed by both respondents adversely to each of them.

The remaining grounds, asserted separately by each of the respondents, attack the bill for multifariousness, but are confined to the first phase of the bill which seeks relief on account of the mistake in the deed executed by Mrs. Smith to her co-respondent, Mrs. McNealy.

Complainant claims an equitable title to all the lands in controversy from the same grantor, Mrs. Smith, and also asserts that all the lands claimed by her, whether acquired by deed or mortgage, was by mistake included in the deed from Mrs. Smith to Mrs. McNealy.

The bill properly presents a case for the exercise of the court's jurisdiction to reform and correct the deed, and the court will grant full relief to the end of foreclosing the mortgage, if the complainant establishes by evidence ^{see} her right to a correction of the misdescription: *Bieler v. Dreher*, 129 Ala. 384, 30 South. 22; *McGehee v. Lehman, Durr & Co.*, 65 Ala. 319. These grounds of demurrer are, therefore, not well taken.

It follows that the decree appealed from must be reversed, and a decree will be here rendered overruling the demurrer.

A Deed may be Reformed so as to embrace land which was intended to be conveyed, or to exclude land from its operation which was not intended to be conveyed. And if a mistake of description occurs in a series of conveyances, under circumstances that would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and give the last vendee a right of reformation against the original vendor: See the monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 507-511; *Herring v. Fitts*, 43 Fla. 54, 99 Am. St. Rep. 108, 30 South. 804. Deeds of gift may be reformed: Note to *Williams v. Hamilton*, 65 Am. St. Rep. 514. See in this connection, *Willey v. Hodge*, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75. As to the effect of laches on the right to reformation, see page 504 of this note.

ANNISTON ELECTRICAL AND GAS COMPANY v.
HEWITT.

[139 Ala. 442, 36 South. 39.]

ELECTRIC RAILROADS—Negligence—Injury to Stock.—A railroad company operating its road by electricity and knowingly running its trains under conditions rendering it impracticable for those in charge to prevent injuring stock straying upon its tracks, is accountable for the loss when injury occurs. (p. 42.)

ELECTRIC RAILROADS—Negligent Speed—Injury to Live-stock.—Running an electric street-car in the night-time, at a speed in violation of a city ordinance, and so rapidly that it cannot be stopped within the distance a cow is seen, when she comes on the track twenty yards ahead, is negligence, which renders the railroad company liable for the resulting injury to the cow. (p. 43.)

Lapsley, Arnold & Martin, for the appellant.

R. Blackman, for the appellee.

443 HARALSON, J. The law is well settled that railroad companies that knowingly run their trains under conditions rendering it impracticable for those in charge to prevent injuring stock straying on their tracks, are accountable for the loss when injury results: Birmingham etc. R. R. Co. v. Harris, 98 Ala. 326, 13 South. 377; Louisville etc. R. R. Co. v. Davis, 103 Ala. 661, 16 South. 10; Louisville etc. R. R. Co. v. Cochran, 105 Ala. 354, 16 South. 797; Louisville etc. R. R. Co. v. Kelton, 112 Ala. 533, 21 South. 819; Central of Georgia R. R. Co. v. Stark, 126 Ala. 367, 28 South. 411.

This principle applies, when needful for the protection of life and property, to a railroad on which electricity is used as the moving power, as well as to one operated by steam: Louisville etc. R. R. Co. v. Anchors, 114 Ala. 493, 504, 505, 62 Am. St. Rep. 116, 22 South. 279.

The law enjoined upon the motorman operating defendant's car the duty to keep a lookout for livestock, and not to run his car at such a rate of speed that he could not stop it within the distance he could see the plaintiff's cow. The only qualification of this rule is that where—such duties being observed by the engineer or motorman—the animal comes suddenly upon the track, so close to the engine that the engineer cannot stop in time to prevent running over it, in which case its destruction cannot be ascribed to defendant's negligence: Louisville etc. R. R. Co. v.

Brinkerhoff, 119 Ala. 606, 24 South. 892; Central of Georgia R. R. Co. v. Stark, 126 Ala. 367, 28 South. 411.

In this case, the evidence showed without conflict, that by an ordinance of the city of Anniston, in the corporate limits of which city plaintiff's cow was killed, it was ordained, that "no person shall run, or cause to be run, any railroad train, car or engine, within the corporate limits of Anniston, faster than at the rate of six miles an hour." The evidence satisfactorily showed that the car was running, at the time of the accident, over six miles an hour. The motorman testified it was running about ten miles an hour. He also testified that a car running at an ordinary rate of speed can be stopped within a distance of about thirty steps. Other ⁴⁴⁴ evidence tended to show that it can be stopped within a distance of twenty-five or thirty steps, and that it could not be stopped within fifteen or twenty steps. The motorman also testified that when he first saw the cow, she was running up a bank about twenty feet ahead of the car; that he put the brakes on immediately as tight as he could, and did all he could to stop the car, that he could not see over twenty feet in front of the car, and it was impossible to stop it within that distance. The killing occurred in the night-time, and the track was straight and free from objects calculated to obstruct the view of the motorman.

From this it appears that the car was being run in the night-time, at a speed which was in violation of the city ordinance, and so rapidly, as that it could not be stopped within the distance the cow was seen when she came on the track—twenty steps ahead.

The court below, trying the case without a jury, found for the plaintiff, and rendered a verdict and judgment in his favor for thirty dollars, the value of the cow as shown by the evidence. It has not been made to appear that this judgment was erroneous.

Affirmed.

It is Negligence in a Railroad company to run its trains in the night-time at such a speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which stock upon the track can be seen by the aid of the headlight on the engine. If injury to stock results from such negligence, the company is answerable to the owner: Alabama etc. Ry. Co. v. McGill, 121 Ala. 230, 25 South. 781, 77 Am. St. Rep. 52, and note. As to the liability of railway companies, in general, for injuries to animals trespassing on their tracks, see the notes to Tona-wanda R. R. Co. v.

Munger, 49 Am. Dec. 261-273; Memphis etc. R. R. Co. v. Ke Am. St. Rep. 161, 162. And as to whether it is negligence per run a train at a speed prohibited by law, see Hutchinson v. Mi Pac. Ry. Co., 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep and cases cited in the cross-reference note thereto.

YOUNG v. SHELDON.

[139 Ala. 444, 36 South. 27.]

MARRIED WOMEN—Power of Sale of Land—Execution Without Joinder of Husband.—If a testator, by his will, devise his property to his wife, "during her lifetime, to manage at her control, or as she may think best, for herself and her children, in order to contract debts and pay them out of the property as she may deem expedient, or to sell off the property as she thinks proper during her lifetime, and at her death" the remaining property to be so the proceeds divided among his children, he thus confers upon her power to dispose of the property in fee, which she may do without the joinder of her then husband. (p. 46.)

MARRIED WOMEN—Execution of Power of Sale—Joiner of Husband.—A married woman may, without the assent or concurrence of her husband, execute a power conferred upon her to dispose of lands in fee by executing her sole deed thereof. (p. 46.)

POWERS OF SALE—Intention to Execute.—It is not necessary that the intention to execute a power of sale shall appear in express terms or recitals in the instrument, and it is sufficient if it appears by words, acts, or deeds, demonstrating such intention. It is necessary that the power be referred to, or recited, in the deed of the donee of the power, provided the act of the donee shows that he had in view the subject matter of the power at the time of executing the deed. (p. 48.)

R. T. Simpson, Jr., and P. Hodges, for the appellant.

J. B. Weakley, for the appellee.

447 **TYSON, J.** The plaintiff, in order to recover her case, must, of course, have the legal title. She predicated her claim to said title upon item 3 of her grandfather's will, which is in these words: "I give to my beloved wife, Hetty D. Tyson, who is my sole executrix, all my lands, negroes and stock, and all my property of any description, after the payment of all my just debts, etc., and my youngest son, Daniel A. Tyson, receives his portion heretofore mentioned, during her lifetime, to manage at her control or as she may think best for herself and her children in future, to contract debts and pay them out of the property as she may deem expedient, or to sell off the property as she thinks proper during her lifetime, and

death—I want all the effects that she has in any way, lands, negroes and property of any kind whatsoever to be sold at public sale to the highest bidder and the proceeds or dues of said ⁴⁴⁸ sale to be equally divided between my four children,” naming them.

It is in right of the four children named, as remaindermen, she being their sole surviving heir at law, that her contention is based on for recovery. Assuming that a remainder was created, it is clear that the gift over was intended to operate simply on such of the property as was unsold by Mrs. Jones, at her death, since Mrs. Jones had an absolute power of disposition by sale of any or all of the property devised to her. Conceding the applicability of section 1046 of the Code, without deciding that it has application to the provisions of the will quoted above, prior to its enactment where the devise was one for life with absolute power of disposition, the first taker took the absolute fee free from the limitation over and the remainderman took nothing. The limitation over, attempted to be created in such cases, was void for repugnancy: *Flinn v. Davis*, 18 Ala. 132; *Alford v. Alford*, 56 Ala. 350; *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105; *Ide v. Ide*, 5 Mass. 500; *King v. Beck*, 12 Ohio, 390, 474. And this is still the law as to creditors and purchasers. So far as their rights are involved the first taker is still the owner of the fee. As said in *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105: “Section 1850 [1046] of the Code is no more than a statutory recognition of this doctrine so far as purchasers and creditors are concerned, but it changes the rule, where rights of purchasers and creditors do not supervene, in respect of and only in respect of future estates limited upon the life estate of the donee of the power, and to estates thus limited provides in effect that unless the power of disposition is exercised by the tenant for life or years, they shall be executed and vested in title, possession and enjoyment in the remainderman upon the death of the tenant of the particular estate. But the ulterior estates thus protected must rest upon express limitations and not upon mere implication.”

It affirmatively appears that Mrs. Jones, in whom was reposed the power of sale of the fee of the lands, in 1867, sold them to the defendant's vendor, Mrs. Cobb, who paid the purchase money and went into possession, ⁴⁴⁹ and executed to her a warranty deed conveying a fee simple estate. It is true it is also made to appear that Mrs. Jones had prior to the execution of this deed intermarried with one McClaren and was his wife at the date

of its execution. Its validity is challenged upon the ground that her husband did not join with her. It is doubtless true that no valid conveyance of Mrs. Jones' estate in the land could have been made by her alone: Code 1852, sec. 1984; Code 186 sec. 2373. Since she is dead and the only estate she took by virtue of the will was a life estate, the questions presented are: Whether she could, without the consent or concurrence of her husband, execute the power conferred upon her to dispose of the fee; and 2. Does it appear that she intended to execute it?

Before answering these questions it may be well to say, and not to assume, that a mere power collateral or in gross was conferred upon Mrs. Jones to dispose of the fee: 1 Sugden on Powers, 106, also 183, 184, and note; Kent's Commentaries, 1st ed., 317; 2 Washburn on Real Property, 691; 22 Am. & Eng. Ency. of Law, 2d ed., 1155, 1156.

It is thoroughly well settled that at common law a married woman could, without the consent or concurrence of her husband, execute a power, whether appendant, in gross or simply collateral, notwithstanding her disability to dispose of her estate. And it is of no consequence whether the power was granted to her before or after she became a married woman: 1 Sugden on Powers, 181, 182; Kent's Commentaries, 321; 2 Washburn on Real Property, 317; 22 Am. & Eng. Ency. of Law, 2d ed., 1106, and notes. This principle is stated by Sugden in this language: "By the common law a married woman could not dispose of her own estate without a fine and recovery, for which the statute law has now supplied a remedy with certain formalities; but, simply as the instrument or attorney of another, she could convey an estate in the same manner as her principal, because the deed was considered a deed of the principal, and not of the attorney and her interest was not affected. . . . It is not material whether the power is given to an unmarried woman, who afterward marries, or to a woman while she is married or upon her marriage and she survives her husband, and afterward takes another; in all these cases she may execute the power, and the concurrence of her husband is in no case necessary."

In discussing the statutory mode regulating conveyances to married women of their estates in lands the supreme court of Maryland in *Armstrong v. Kerns*, 61 Md. 367, after pointing out the requirement of the statute that the husband must join in the deed, said: "But it has never been considered that the statutory mode of conveyance by the wife jointly with her

band was exclusive of all other modes of conveyances that might be prescribed or authorized by the grantor, donor or settler of the property upon the wife, or that it rendered the wife incapable of executing a power." In *Deffenbaugh v. Harris*, 6 Atl. 139, 18 Week. Not. Cas. 357, the action was ejectment, as here, and the plaintiff's right to recovery depended upon whether there had been a proper execution of the power by the life tenant, a married woman, upon whom had been conferred a power of disposition of the fee. The donee of the power executed a deed conveying the fee to one Stevens, without her husband joining in it, and the point was made against its validity on that account. The trial court excluded the deed and the defendants appealed. The will conferring the power was so strikingly similar in language to this one that we quote it. It read: "I give and bequeath to my daughter Mary, intermarried with Joseph S. P. Harris, the house and lot, etc. [describing the property], and I hereby authorize and empower my said daughter Mary to sell and dispose of the same as she may think proper, but in case of her death and the property as aforesaid remaining unsold, then it is to be equally divided amongst her children, share and share alike, as they may arrive at the age of twenty-one." It also appears from the brief of counsel that there was a statute regulating the execution of conveyances ⁴⁵¹ by married women similar to ours. The court speaking through Sterrett, J., said: "Constructing the devising clause in question according to the plain import of the language employed and in the light of other provisions of the will, we think the testator intended to give Mrs. Harris a life estate in the lots with remainder in fee to her children, subject, however, to divestiture by the execution of the power of sale given in express terms to the life tenant. The power thus given to Mrs. Harris by her father is a power to appoint, by way of sale or otherwise, to other uses than those specified in the will, and was, therefore, well executed by herself alone without her husband joining in the deed of conveyance to Stevens. Nothing is better settled than that a feme covert may, without the concurrence of her husband, execute any kind of power, whether given to her when single or married. To require his concurrence might not only embarrass the donee of the power in its execution, but in case of his refusal to concur would prevent its execution altogether, and thus defeat the testator's intention. It is obvious from a consideration of the entire will in the case that the intention of the testator was to exclude the husband from all interest in the control over the property to

which the power of sale relates. Stevens, the vendee of Mrs. Harris, derived title to the lots in question, as part of the estate of Aaron Burns (testator), under and by virtue of the power of sale, and not by virtue of any estate in Mrs. Harris herself. The only estate she had was for life, but the power of sale when executed, as it was by a regular deed of conveyance, vested in him the fee to the lots in controversy; and the plaintiffs in error claiming under him, should have been permitted to show their title."

This authority practically decides every question involved in the case under consideration. It is true the second question propounded above is not discussed, and the intention of the donee of the power to execute it seems to be assumed to have existed from the fact that the deed purported to convey the fee. And this assumption was a correct one as we shall show. "It is not necessary that the intention to execute a power of ⁴⁵² sale shall appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds, demonstrating the intention": *McRea v. McDonald*, 57 Ala. 423. Nor is it necessary that the power be referred to or recited in the deed of the donee of the power, provided the act of the donee shows that he had in view the subject of the power.

An instance used by Mr. Washburn, quoted approvingly in *Gindrat v. Montgomery Light Co.*, 82 Ala. 604, 60 Am. Rep. 769, 2 South. 327, and in *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 133, 90 Am. St. Rep. 22, 30 South. 466, of a sufficient execution of power is directly in point. It is this: "Thus, if one have a life estate in land and a power of appointing in fee, and conveys the fee it is an execution of the power." Continuing, the author says: "When a person conveys land for a valuable consideration, he must be held as engaging with the grantor to make the deed as effectual as he has power to make it": See, also, *Yates v. Clark*, 56 Miss. 212; *Baird v. Boucher*, 60 Miss. 326; *White v. Hicks*, 33 N. Y. 383; *Hall v. Preble*, 68 Me. 100; *South v. South*, 91 Ind. 221, 46 Am. Rep. 591; *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Bishop v. Remple*, 11 Ohio St. 277.

In conclusion it may not be amiss to say that section 1052 of the Code simply prescribes the formality of the instrument necessary to a valid execution of a power and in no wise affects the capacity of the donee to execute it.

Affirmed.

A Power of Sale given in a will should receive a liberal construction in order to carry out the purpose and intent of the testator. No express recital of the power seems necessary: *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854, 72 S. W. 964; *Gulf etc. Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22, 30 South. 466. A *feme covert* executrix may execute a power without her husband, and her deed as executrix for lands devised to be sold is valid, though she is not privately examined: *Tyree v. Williams*, 3 Bibb, 365, 6 Am. Dec. 663.

MAYOR OF BIRMINGHAM v. BIRMINGHAM WATER- WORKS COMPANY.

[139 Ala. 531, 36 South. 614.]

MUNICIPAL CORPORATIONS—*Contracts by—Ultra Vires.*—An agreement by a municipal corporation to limit the amount of license tax to be exacted of a water company during the term of a contract to supply water, if made without legislative sanction, is *ultra vires*, and void. (p. 61.)

E. D. Smith, for the appellant.

London & London, for the appellee.

533 **DOWDELL, J.** This appeal is taken from the judgment of the city court rendered on an agreed statement of facts, which is set out in the bill of exceptions. The appellee sued the appellant to recover back five hundred dollars which it had paid the appellant, under protest, as a license tax—the license tax imposed being one thousand dollars—the half of which the appellee admitted the appellant had the right to impose and collect, and which it paid without protest; but the other half the appellee contended appellant had no right to exact under the terms of the contract into which it had entered with appellee, and was paid under protest. The contract entered into was with reference to the supply of water for the city of Birmingham and its inhabitants. By the agreed statement of facts it is admitted: 1. The city had power to contract for a supply of water; 2. That it did make the contract of June 2, 1888, which is set out in the record, and upon the faith of which appellee expended a large amount of money in the construction of a waterworks system; 3. That the license tax at the time the contract was made was five hundred dollars per annum, and so remained from the date of the contract until the year 1900, 533 when the appellant raised the license tax to one thousand dollars.

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The only question presented is whether section 22 of the contract, which is set out in full as a part of the agreed statement of facts, is valid. Section 22 of the contract reads as follows: "Be it further ordained, that the license tax against said Birmingham Waterworks Company, its successors and assigns, shall not exceed the present license tax during the existence of the contract above named." By section 14 of the contract, the term of the contract was for thirty years. The power of the city to license trades, occupations, etc., is conceded, and no question is made on the reasonableness of the license attempted to be imposed.

It seems to be a well-established proposition of the law that the levying of a license tax is a legislative or governmental power. In the case of *Savings & Loan Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 461, it is said: "The power to tax is, therefore, the strongest, most prevailing, of all the powers of government, reaching directly or indirectly to all classes of people." In the case of *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 264, it was decided that an ordinance delegating to the mayor the right to fix the amount of a license fee was void, as a delegation of legislative power. See notes on page 721 of 20 L. R. A., showing that the power to fix a license fee is generally regarded as a legislative power, which cannot be delegated. It is not denied, as a general proposition, that it is in the power of a municipality to contract for a supply of water, since such a right comes within the business or proprietary powers of the corporation, and is not to be classed as a legislative or governmental power. But it does not follow from this that, in the exercise of such a power in the making of a contract for a supply of water, the corporation can by any provision or terms in such a contract delegate or barter away a governmental power, when not authorized so to do by the legislature either in its charter or other statutory enactment. There can be no difference in principle between delegating a governmental power, and bartering or contracting away such power. Nor is there any distinction in principle ⁵³⁴ between an agreement not to levy a tax for a term of years, and one which stipulates an annual license tax already levied shall not be increased for a term of years. It is not pretended that the city of Birmingham, by its charter or other statutory enactment, was expressly authorized to enter into the agreement contained in section 22 of the contract set out above; and, unless the power so exercised is one that can be necessarily and reasonably implied, the agreement not

to increase the annual license tax for a term of thirty years was ultra vires the corporation, and consequently void. The settled rule of construction of a grant of power by the state to a corporation calls for a strict construction, and in favor of the state and against the corporation. Such power cannot be implied from the mere fact of its being within the business or proprietary power of the municipality to contract for a supply of water. It is not to be presumed that it was necessary for the city to barter or contract away its taxing power in order to provide for a supply of water, and the implication of such a power must be a necessary one. Our attention has not been directed to any provision of the charter or to any legislative enactment out of which any such implied power could arise. The case of *Stein v. Mayor of Mobile*, 49 Ala. 362, 20 Am. Rep. 283, is relied on in support of appellee's contention. In that case the contract was expressly ratified by an act of the legislature, and we suppose that was the reason the court did not consider, but assumed the contract was valid, and that the city council had the right to stipulate for exemption. The contract, however, was not open to such construction. A careful reading of the contract in that case leads us to the conclusion that the words, "without let, molestation, or hindrance," had no reference to taxation or license. Other cases cited by counsel may be distinguished from the one under consideration, either in that the exercise of a governmental power was not involved, or, where such was the case, the subsequent ratification of its exercise by the legislature.

Our conclusion is that section 22 of the contract is void, and the court below erred in the judgment rendered and one here rendered in favor of the appellant.

Reversed and remanded.

Sharpe, J., not sitting.

The Judgment of Municipal Authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the court. Nevertheless, the delegation of legislative power to subordinate political bodies of the state is solely for public purposes, and must be exercised with reference to them. If an act is so remote from every such purpose that no relation thereto can, within human reason, be discovered, such act must be excluded from the delegation. Thus, an ordinance whereby a village contracts for practically fifty years to take all its lights from a corporation, and pay for them at a rate fixed by the ordinance is unreasonable and void, especially when the village has already reached a population

entitling it to become a city, and it is practically a part of a city, though not yet within its corporate limits, and the prices paid are in excess of those elsewhere paid under similar circumstances: *Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 97 N. W. 203.

NELSON v. FIRST NATIONAL BANK.

[139 Ala. 578, 36 South. 707.]

PLEADINGS—Amendment.—The doctrine of the relation of amendments to the commencement of a suit is a fiction of law and should never be applied when it will operate to cut off a substantial right or defense to new matter introduced by the amendment to the complaint, though connected with the original cause of action. (p. 55.)

STATUTES of Limitation furnish a defense as meritorious as any other. (p. 55.)

PLEADINGS—Amendment—Plea of Limitation.—An amendment to a complaint, in order to come within the doctrine of relation back to the commencement of the suit, and cut off the plea of the statute of limitations, must be but a varying form or expression of the claim or cause of action sued on, and the subject matter of the amendment must be wholly within the lis pendens of the original complaint. (p. 55.)

PLEADINGS—Amendment—Plea of Limitation.—If the matter introduced by way of amendment to a complaint, although it bears no relation to the cause of action in the original complaint, as might have been joined in a different count in the original complaint, introduces a new claim, or a new cause of action, requiring a different character of evidence for its support, and affording a different defense from that to the cause as originally presented, it does not relate back to the commencement of the suit, so as to prevent the plea of the statute of limitations to the new matter thus introduced. (pp 55, 56.)

PLEADINGS—Amendment—Plea of Limitation.—Plaintiff may introduce a new cause of action, or a new right or claim arising out of the same transaction, by amendment to his complaint, but such amendment cannot have relation back to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate as a bar to a new suit commenced for the cause of action at the time of making such amendment. (p. 56)

PLEADINGS—Departure by Amendment—Plea of Limitation.—In determining whether an amendment to a complaint asserts a new matter for a new claim, and relates back to the commencement of the suit so as to cut off the plea of the statute of limitations, the test is whether the matter set up in the amendment amounts to a departure in after pleading, and if it does, the amendment cannot thus relate back. (p. 59.)

PLEADING—Departure by Amendment—Plea of Limitation.—A complaint setting up a claim for money had and received, and an amendment setting up a claim for goods sold and delivered, growing out of the same transaction, presents a departure in after pleading, and such amendment cannot relate back to the time of the commencement of the suit, so as to cut off the plea of the statute of limitations as to the matter set up in such amendment. (p. 61)

Gunter & Gunter, for the appellant.

Watts, Troy & Caffey, H. Stringfellow and J. M. Chilton, for the appellee.

⁵⁸⁴ DOWDELL, J. The suit in this case was begun on the twentieth day of March, 1896, with a complaint containing a single count, claiming for money had and received by the defendant on the twenty-sixth day of June, 1890, for the use of the plaintiff. On the 21st of December, 1896, the plaintiff, by leave of the court, amended the complaint by filing a second count, claiming the same sum as claimed in the first or original count; and by leave of the court, on June 9, 1897, she further amended the complaint by filing a third count, in which the same sum is claimed as in the first and second counts, for goods, wares and merchandise sold on June 27, 1890, and avers that the cause of action thereunder is the same as that embraced in the first and second counts. On motion of defendant, that part of the second count beginning with the words, "and plaintiff avers that in 1892," and going down to the end of the count, was stricken out. As the second count remained after eliminating the part stricken on motion, it reads as follows: "The plaintiff claims of the defendant the further sum of twenty thousand (\$20,000) dollars with interest thereon from, to wit, June 26, 1890, for this, to wit, that, theretofore, and then, the plaintiff was a married woman, the wife of one O. O. Nelson, and theretofore was the owner and was possessed, as a separate estate under the laws of Alabama, of a parcel of real estate in the city of Montgomery, known and called 'The Pollard place,' and had sold the same to the Savannah, Americus & Montgomery Railroad Company for thirty thousand dollars, ten thousand dollars of which was paid in cash, and for the remainder she had taken two notes of the purchaser, for ten thousand dollars each, payable at one and two years from date, with interest from date, at the banking house of Moses Brothers, Montgomery, Alabama, which said notes were duly secured by mortgage made by the purchaser to the plaintiff on the said real estate so sold, and conveying the same to the plaintiff; that on, to wit, ⁵⁸⁵ the twenty-seventh day of June, 1890, she, by written indorsement on said notes, joined in by her husband, and by written transfer, also joined in by her husband, and duly witnessed, assigned, transferred and sold to the defendant the said notes and the said mortgage, and the real estate therein mentioned, for the consideration of, to wit, twenty thousand

dollars, and handed the said securities and papers to her band for delivery to the said defendant; that the said O. O. son did so deliver the said notes and securities to the defendant and were accepted by the said defendant as upon the said of plaintiff to it, whereby the defendant became liable to the plaintiff the consideration for the transfer of said and mortgage, which plaintiff avers was and is, to wit, the of twenty thousand dollars, which plaintiff avers it has paid, and which is still due and unpaid, with interest therefrom, to wit, the 27th of June, 1890. And plaintiff avers the cause of action in this count is the same as that sued in the first count, and is only a statement of the special of the case." That part of this count so stricken on contained a narration of a suit in the chancery court of Montgomery county by the plaintiff against this defendant, relative to the subject matter embraced in the present action, but matter so stricken out did not change the nature and character of the count; that is, the count remained an action for purchase price of the notes and securities described therein in no wise affects the application of the legal principles and under the several pleas of the defendant upon which the plaintiff joins issue. To the first count, among others, the defendant filed pleas of the general issue and payment; and to the second and third counts, among other pleas, the defendant pleaded the general issue, payment and statutes of limitation three and six years. No demurrer or special replication filed to these pleas of the general issue, payment and statute of limitation, but issue was joined on each of them.

The cause of action on which the suit is based arose on the twenty-seventh day of June, 1890, and the suit was commenced on the twentieth day of March, 1896, thus being within the six years period. It is evident that at the date of the filing of the second and third counts, respectively, to wit, December 21, 1896, and June 9, 1897, the statutory bar of six years was complete, and furnished a perfect defense to these counts unless they fall within that class of amendments which relate to the commencement of the suit. The doctrine of the relation back of amendments to the commencement of a suit is a rule of law, and should never be applied where it would operate to cut off a substantial right or defense to new matter introduced by the amendment though connected with the original cause of action. In the case of *People v. Judge of Newaygo Circuit Court*, 27 Mich. 138, wherein this doctrine was invoked to

the defense of the statute of limitations pleaded to the amended declaration, in an opinion rendered by Christiancy, C. J., and concurred in by his associates, it is said: "But long before this amended declaration was filed, or leave to file it applied for, the statute of limitations had taken effect upon and barred the cause of action set forth in it. Had a new suit then commenced for the same cause of action, it is not contended that it could have been maintained; and we see no substantial difference between the commencement of a new suit and the allowance of this amended declaration, under these circumstances, for the same cause of action. It is clear enough that the only purpose and object of allowing the amended declaration, instead of putting the plaintiff to a new action after they had submitted to a nonsuit, which nonsuit had been set aside, was to prevent the statutory bar of the action. We do not think that the statute can be evaded by any such necromancy, and to permit the shallow fiction of a relation back to the commencement of the suit, under such circumstances, to nullify the action of the legislature, would be discreditable to the judiciary."

Statutes of limitations are statutes of quiet, and they are beneficent in that they put an end to disputed claims, prevent litigation, quiet titles, and give rest and repose. No matter what may be the criticisms of the casuist, in the eyes of the law these statutes are no longer regarded ⁵⁸⁷ as harsh, but furnish a defense as meritorious as any other. While our statutes of amendments are broad and liberal, it is not every amendment allowable under the statute that will relate back to the commencement of the suit, operating to cut off the plea of the statute of limitations, as to the matter introduced by the amendment. It seems to be the settled rule that the amendment, in order to come within the doctrine of relation back to the commencement of the suit, must be but a varying form or expression of the claim or cause of action sued on, and the subject matter of the amendment wholly within the *lis pendens* of the original suit. If the matter introduced by way of amendment, although it be such as might have been joined in a different count in the original complaint, introduces a new claim, or a new cause of action, requiring a different character of evidence for its support, and affording a different defense from that to the cause as originally presented, it will not relate back to the commencement of the suit, so as to prevent the plea of the statute of limitations to the new matter thus introduced. In *King v. Avery*, 37 Ala. 169, where the amendment consisted in adding the name

of the husband as a party plaintiff with the wife, in whose name the suit was originally instituted, it was held that the amendment was not allowable, for that it introduced a new claim, and changed the character of the suit from that of the wife to that of the husband, though the cause of action remained the same, and it could not relate back to the commencement of the suit, to prevent the operation of the bar of the statute, which was complete at the date of the filing of the amendment. In *Lansford v. Scott*, 51 Ala. 557, where the original complaint contained a single count upon a promissory note, and by leave of the court the plaintiff at a subsequent term amended his complaint by adding the common counts for goods sold and delivered, money had and received and on an account stated, this court held that the statute of limitations was pleadable in bar to the common counts so introduced by amendment into a complaint on a promissory note given for the same cause of action, the limitation having expired since the commencement ⁵⁸⁸ of the suit on the note, but before the amendment was made. In the case of *People v. Judge of Newaygo Circuit Court*, 27 Mich. 138, the original complaint was upon the common counts, and the amended declaration declared upon a contract which related to the same subject matter, setting out specifically the facts; and it was held by the court that there could be no relation back; that the bar of the statute being complete as to the amended counts at the time of the filing of the same, was a perfect defense. In *Mohr v. Lemle*, 69 Ala. 180, in an opinion by Brickell, C. J., it was said: "The latitude of amendments allowed to the plaintiff cannot be allowed to work injustice to the defendant, or to deprive him of any just or rightful defense. The plaintiff may introduce a new cause of action by amendment, but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced for that cause of action at the time of making the amendment. The whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat, right and justice. When an amendment introduces a new right or new matter, not within the *lis pendens*, and the issue between the parties, if, at the time of its introduction, as to such new right or matter the statute of limitations had operated a bar, the defendant may insist upon the benefit of the statute, and to him it is available as if the amendment were a new and independent suit"—citing approvingly *King v. Avery*, 37 Ala. 169, and *Lansford v. Scott*,

51 Ala. 567. Again, it is said, in *Steiner v. First Nat. Bank*, 115 Ala. 387, 22 South. 32, in an opinion by Brickell, C. J.: "Relatio est fictio juris" is upheld to advance a right, not to advance a wrong, and it is said the limitation of it so as to prevent it from doing injury to strangers, or defeating mesne lawful acts, is a common language of the books": Citing *Jackson v. Davenport*, 20 Johns. 551. "The general rule is that amendments of pleadings, without regard to the time or stage of the cause at which they are introduced, have relation to the commencement of the suit, or to the time when the matter ~~was~~ could have been pleaded originally. But the relation is not imputed, if it would deprive a party against whom the amendment is made of any substantial right. If an amendment of a complaint introduces new matter, or a new claim, as to which the statute of limitations has perfected a bar, the bar cannot be avoided by referring the amendment to the commencement of the suit"—citing *Mohr v. Lemle*, 69 Ala. 180. The following authorities are also in line with the foregoing principles: *Anniston etc. R. R. Co. v. Ledbetter*, 92 Ala. 326, 9 South. 73; *Barker v. Anniston etc. Ry. Co.*, 92 Ala. 314, 8 South. 466; *Alabama etc. Ry. Co. v. Smith*, 81 Ala. 299, 1 South. 723; *Tompkins v. Holt (Ala.)*, 8 South. 794.

It may be that in our decisions, when speaking on the subject of amendment, the employment of the expression of new cause of action is calculated to produce some confusion or misapprehension. But an analysis of these cases will be sufficient to show that the expression can be taken when so used as intending nothing more than a new right or claim arising out of the same transaction. If it were not so, that is to say, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint, then it would constitute what we have sometimes designated as an entirely new cause of action, and one which could not be introduced into the complaint by amendment, if objected to. Identity of transaction is, therefore, the basis for the introduction by way of amendments of counts on new claims or rights arising out of the same. If the matter sought to be introduced by amendment relates to an entirely different transaction from that laid in the complaint, it would be such a radical change as to constitute an entirely different cause of action, not allowable under our very liberal construction of the statute of amendments. In the case of *Central R. R. etc. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006, the question was whether to a complaint charging simple negligence

merely, a count may be added, charging willfulness or wantonness, or vice versa, and in an opinion by the present chief justice, it was said: "These authorities serve fully to support the proposition with which we began the discussion, namely, ⁵⁹⁰ that so long as counts added by amendment set up the same general transactions or occurrences upon which the original complaint relied for recovery they do not introduce an entirely new cause of action, and are not objectionable, though the form of action may be changed by them as from trover to case, or vice versa, or from case to trespass, etc.; and they further serve to differentiate the rule of amendments prescribed by the statute as construed by the court from the rule against departures in after pleading from the case made by the complaint. It is no objection to an amendment that it works a departure from the original complaint within the meaning of the rule last referred to." It is by virtue of the statute and the liberal construction put upon it by the courts, that an amendment which brings in a new right or claim arising out of the "same general transactions or occurrences" does not offend against the rule as to departure in after pleading. But the statute of amendments does not give the amendment an operation back to the commencement of the suit, so as to defeat the bar of another statute. This operation depends not upon the statute of amendments, but upon a legal fiction. It is, therefore, quite evident, that but for the statute, an amendment which introduces a new claim, though arising out of the same general transaction as declared on in the original complaint, would be subject to the rule against departures in after pleading, and there is nothing to differentiate amendments, when considered for the purpose of determining their right to relate back, from the rule against departures in after pleading. When considering amendments alone with reference to the question of their relation back to the commencement of the suit so as to cut off the bar of the statute of limitations, in determining whether they set up new matter or claim, it is by this common-law rule against departure in after pleading that they may be tested. This conclusion was reached by the supreme court of the United States in the case of *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 877, 39 L. ed. 983, where, in an opinion delivered by Mr. Justice White, holding that the amendment did not relate ⁵⁹¹ back, after citing cases of the supreme courts of the different states, among them some of the decisions of this court, cited above, it was said: "The legal principles by

which the questions must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of amendment. In many of the states which have adopted the code system, great latitude has been allowed in regard to amendments, but even in those states it is held that the question of what constitutes a departure in amended pleading is nevertheless to be determined by the common law, which thus furnished the test for ascertaining whether a given amendment presents a new cause of action by way of amendment." What constitutes a departure in pleading is thus stated in *Stephen on Pleading*, page 410: "A departure in pleading takes place where a party deserts the ground that he took in his last antecedent pleading and resorts to another." In the case of *McAden v. Gibson*, 5 Ala. 341, it is said: "A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made and has recourse to another; it occurs when the replication or rejoinder, etc., contains matter not pursuant to the declaration or plea, etc., which does not support or fortify it." It is quite plain, we think, that neither the second nor third count, here introduced by way of amendment, is "pursuant" to the first count, which constituted the original complaint, nor did it "support or fortify" it, but on the contrary, there was clearly a quitting or departure from the ground of liability as stated in the first count.

That a claim for money had and received for the use and benefit of the plaintiff, and a claim for goods sold by plaintiff to the defendant, are essentially different in nature or character, and especially in the evidential facts necessary to support the one or the other, we think hardly open to question. It is perfectly clear that evidence which would support an action for goods sold by plaintiff to the defendant would not support an action for money had and received by the defendant for the use ⁵⁹² and benefit of the plaintiff, and vice versa. One claim rests upon a contract, express or implied, to pay for the goods sold, while the other has its foundation upon the equitable principle that the defendant has money which, *ex aequo et bono*, belongs to the plaintiff. Besides, the measure of plaintiff's recovery under the several counts in the amended complaint in the present suit is different under the rules of law. Under the first count, for money had and received, the measure of the recovery would be the amount or value of what

came into the defendant's hands as the proceeds of the notes and securities; under the second count, which declares upon a special contract, the measure of recovery would be the stipulated price; under the third count, for goods, wares and merchandise sold, the measure would be the value of the notes themselves at the time of the sale—of course in each instance, with the interest added. The rule of damages in actions for money had and received arises from the nature of the action, founded as it is upon the equitable principle which forbids one person from being unjustly enriched at the expense of another; while in a contract for the payment of money which is express, its terms fix the amount due thereunder. Where an implied assumpsit is relied on, as for goods, wares and merchandise sold, when no price is fixed, the rule is that of a quantum valebat.

While this criterion of determining the character of amendments with reference to the principle of relation back to the commencement of the suit has not heretofore been expressly stated by this court, it may here be observed that in those cases where it was held that the amendment did not relate back so as to cut off the bar of the statute, the amendments were such as were violative of the common-law rule against departure in after pleading. On the other hand, in those cases where the amendment was held to relate back, the new matter introduced presented no new claim or right arising out of the same general transaction, nor change of ground of liability from that originally laid in the complaint, but merely stated in varying forms of expression ⁵⁹⁸ the same claim or right in order to meet the different phases of the testimony, and without the changing or departing from the original ground of liability. The new matter so introduced being within the *lis pendens*, supporting and fortifying the original complaint, and leaving the issue unchanged. As, for instance, in the case of *Dowling v. Blackman*, 70 Ala. 303, cited by appellant, the original complaint was in code form, and claimed two hundred dollars, due by promissory note dated December 29, 1869, and payable January 1, 1871. The amended complaint set out the note in full, being for the same amount, bearing the same date, and payable on the same date as that described in the original complaint, but shows that it contained contingencies upon the happening of which the note was not to be paid, and which contingencies it was alleged had never happened. The question arose as to whether the statute of limitations ran to the date of the filing of the amendment. The court decided that the

amendment simply varied the description of the instrument that was already in suit, and set up no new claim or different ground of liability from that declared in the original complaint. There can be no doubt of the correctness of this decision, and it in no wise conflicts with the principles we have above stated. So, too, in the cases of *Winston v. Mitchell*, 93 Ala. 554, 9 South. 551, and *Adams v. Philips*, 75 Ala. 461, both of which were cases in equity, *Turner v. White*, 97 Ala. 545, 12 South. 601, *Manchester Fire Ins. Co. v. Feibleman*, 118 Ala. 308, 23 South. 759, *Louisville etc. R. R. Co. v. Wood*, 105 Ala. 561, 17 South. 41, and others, where the amendments were held to relate back, they introduce no new claim, and were not offensive to the rule against departures in after pleading. They either merely supplied the details of what was already alleged, or fortified and supported the ground of liability as stated in the original bill of complaint, and in no manner departed from it and resorted to another.

In the light of the foregoing decisions, it is difficult to understand how it can be seriously contended that a new claim or new matter is not introduced by the second and third counts from that sued on in the original complaint. It is true, they may relate to the same subject ⁵⁰⁴ matter (that is, the notes and securities claimed as the property of the plaintiff), but that fact will not prevent the claim introduced by way of amendment from the characterization of a new claim or new matter. (In the cases which we have cited, the matter introduced by way of amendment related to, and grew out of, the same cause of action, and yet the objection to it as new matter or a new claim was not thereby obviated.) Nor can the simple averment by the pleader, in the second and third counts, that it is the same cause of action as declared on in the first count, avail to bring the amendment within the doctrine of relation back to the commencement of the suit. This averment can but be considered as an opinion or conclusion of the pleader. x

Our conclusion is, that the counts added by way of amendment to the complaint did not relate back to the commencement of the suit, and the statute of limitations ran to the date of their filing, and at which time, in this case, the bar was complete.

Under the plea of the general issue, filed to the first count, the burden of proof rested on the plaintiff to show that the defendant had and received money which, *ex aequo et bono*, be-

longed to the plaintiff. We have carefully considered the evidence in the case, and are unable to find that it anywhere shows that the defendant bank ever had and received money, or other thing of value, to which the plaintiff was entitled, nor evidence of any facts from which the jury might reasonably infer such fact. Evidence that defendant discounted and purchased the notes, which the plaintiff had authorized O. O. Nelson, her husband and agent, to sell for her, would not authorize a jury to presume that he, O. O. Nelson, after receiving the purchase money, then deposited the same with the defendant, or that the defendant, in the first instance, in making the discount and purchase, paid for the notes by giving O. O. Nelson credit on its books.

There being no evidence that the money paid for the notes was deposited by Nelson with the defendant to his credit, or that the money was entered by the defendant ⁵⁸⁵ to the credit of Nelson without actually paying it over, nor any evidence from which the jury might fairly and reasonably draw such conclusion, the court committed no error in giving the general charge as requested by the defendant.

The view we have taken of the case renders it unnecessary to consider the other questions presented by the record, which relate to the rulings of the court on special pleas and replications thereto, since if there was error in any of these rulings it was error without injury. There being no reversible error in the record, the judgment of the lower court will be affirmed.

On application for a rehearing by the appellant, we were of the opinion, and so ruled, that we had committed an error in holding that the general charge was properly given for the defendant, but afterward, upon application by the appellee for a rehearing, and still further argument by counsel, and further consideration of the case, we became fully satisfied and confirmed in the correctness of our first conclusion, that there was nothing in the evidence to require a submission of the case to the jury.

Affirmed.

When an Amendment to a Declaration sets up no new matter, but merely relates in a different form the cause of action, it relates to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new and different cause of action, it is treated as a new suit, begun at the time when the amendment is filed: Chicago etc. R. R. Co. v. 149 Ill. 361, 41 Am. St. Rep. 278, 37 N. E. 247, 24 L. R. A. 141

also, *Frost v. Witter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705; *Whereatt v. Worth*, 108 Wis. 291, 81 Am. St. Rep. 899, 84 N. W. 441; *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918; *Thomas v. Price*, 33 Wash. 459, 99 Am. St. Rep. 961, 74 Pac. 563.

MILNER AND KETTIG COMPANY v. DE LOACH MILL MANUFACTURING COMPANY.

[139 Ala. 645, 36 South. 765.]

TROVER—Defense—Bona Fide Purchaser.—It is no defense to the action of trover that the defendant is a purchaser for value, and without notice of the rights of the real owner. (p. 66.)

ATTACHMENT—Sales.—Caveat Emptor applies to the purchaser at a sheriff's sale under attachment, and he acquires no greater title than the defendant in attachment had at the time of the sale. (p. 66.)

TROVER—Levy of Attachment—Custody of Law.—If the legal title to property, and the right to its immediate possession are in one person, the possession of an officer under an attachment writ against another person is illegal, and the property is not in the custody of the law so as to prevent the real owner from maintaining trover for it against one who purchases it at sale under such attachment. (p. 66.)

CONVERSION.—Any Intermeddling with Property of Another, or the exercise of dominion over it, whether by the defendant alone, or in connection with others, in denial of the owner's rights, is a conversion, for which trover will lie, though the defendant had not the complete manuecaption of the property. (p. 66.)

Complaint in trespass and trover for the wrongful taking and conversion of an engine, boiler, and fixtures. Added counts set up that the property described had been wrongfully levied on under attachment sued out by defendant against one Gross, while such property was at all times the property of plaintiff, and that by reason of such attachment and a sale thereunder, such property was wholly lost to plaintiff. Defendant's pleas, so far as necessary to set them out, were as follows:

"10. The defendant for further answer to each count of said complaint says it is not guilty.

"11. The defendant for further answer to said complaint and each count thereof denies each and every allegation thereof."

"13. The defendant for further answer to the complaint, and each count thereof, says that plaintiff sold said property consisting of an engine and boiler described in the complaint to one F. M. Gross in Atlanta, Georgia, in the month of January,

1898, and shipped said property from Erie, Pennsylvania, to said Gross at Kennedy, Alabama, and said property was shipped to Fayette, Alabama, and arrived at Fayette, in Fayette county, Alabama, on February 24, 1898, and said property remained on the cars until it was attached as hereinafter set forth; that on, to wit, March 1, 1898, plaintiff entered into a written agreement with said Gross, in which it is stated that said property belonged to said Gross, that said Gross exhibited said property to the agent and representative of the defendant, and thereby caused defendant to sue out an attachment against said Gross and attach said property as the property of said Gross; that said Gross claimed to own said property from and by virtue of its shipment into the state, and offered it for sale as his property, and defendant had no notice of plaintiff's claim to said property. Defendant under said attachment against said Gross became a judgment creditor of said Gross and sold said property under said attachment."

"To the several pleas the plaintiff filed, among other things, the following replications:

"4. And plaintiff for further answer to each of the pleas of the defendant herein, except those numbered 1, 2, 3, 10, and 11, alleges that all the title notes mentioned in said complaint were surrendered to the said Gross on, to wit, the eighth day of March, 1898, and the said Gross on said date so signed and transferred all his right, title and interest in and to the property mentioned in the complaint to plaintiff, and the same remained upon the cars at Fayette, Alabama, at the time of said levy; said property was wholly the property of plaintiff, and the said Gross had no right, title or interest therein thereto.

"5. Plaintiff, further replying to the thirteenth plea of the defendant in answer thereto, says that on the eighteenth day of March, 1898, after said written agreement was entered into, the said Gross sold, assigned and surrendered to plaintiff all his right, title and interest to said property, and the same remained upon the cars of the railroad, and the said Gross was not in the possession of it, nor was he the owner thereof, at the time of said levy by defendant."

"To the fourth and fifth replications the defendant demurred upon the following grounds: '1. Because it shows that no notice of said sale back to plaintiff by said Gross was given to plaintiff; 2. Because it shows that no notice was given by said Gross of possession of property from said Gross to plaintiff;

cause it is no answer to the estoppel set up in said plea number 13; 4. Because it neither confesses and avoids nor traverses said plea number 13; 5. Because it fails to show any notice to the defendant of sale back by Gross to plaintiff on March 18, 1898; 6. Because it fails to show that delivery of said property was made to plaintiff by said Gross in the sale of March 18, 1898.'

"The demurrers to the replications were overruled."

Verdict and judgment for plaintiff and defendant appealed.

R. C. Redus, for the appellant.

R. P. Wetmore and S. Wilder, for the appellee.

649 HARALSON, J. The case was tried on issue joined on the pleas 10 and 11, which were pleas of not guilty, and on replications 4 and 5 to plea 13. A demurrer was interposed to the twelfth plea, as appears by the judgment entry and was sustained, but the demurrer does not appear in the record.

The demurrer to replications 4 and 5 to plea 13 were properly overruled. If the property levied on by the defendant, under attachment, as is averred in the replications, 650 was, at the time of the levy, wholly the property of plaintiff, and Gross, against whom the defendant had recovered a judgment, in its attachment proceedings, had, at that time, no right, title or interest therein, then the defendant's levy and sale of the property under its attachment, conferred no title on it, as against the plaintiff, and the replications were a full answer to said plea 13.

The evidence fully sustains these replications. From the agreement of counsel as to the facts on which the case was tried, it appears that in January, 1898, the plaintiff contracted in Atlanta, Georgia, to sell to F. M. Gross the property mentioned in the complaint. Gross gave his notes for the property purchased, and in them it was specified that the plaintiff retain the title to the property until the same was paid for.

On March 18, 1898, Gross surrenders and assigns to plaintiff all his right, title and interest to the property sued for, which release and surrender was in writing and duly executed. By this agreement, the sale by plaintiff was rescinded and the plaintiff became, on the 18th of March, 1898, the absolute and unconditional owner of the property, divested of all claims of Gross thereto, and of all the incidents attaching to a conditional sale. The question of conditional sale, therefore, and the protection of defendant as a bona fide purchaser of the property

without notice of plaintiff's title, as provided for in section 1017 of the Code, does not arise, and requires no consideration. It is no defense generally to the action of trover that the defendant is a purchaser for value, and without notice of the rights of the real owner: 26 Am. & Eng. Ency. of Law, 1st ed., 731. The title to the property being absolutely in the plaintiff, which was entitled to its immediate possession, it was attached by the defendant and one Peters, judgment creditors of said Gross, and their writs of attachment were levied on it as the property of said Gross, and it was sold under said attachments as his property—the defendant becoming the purchaser. In buying at the sheriff's sale under attachment against Gross, caveat emptor applied, and defendant acquired no greater title than Gross had at ¹⁸⁵¹ the time of the sale; and under the facts of the case as agreed on, he had no title: *Goodbar v. Daniel*, 88 Ala. 533, 16 Am. St. Rep. 76, 7 South. 254; *Lindsay v. Cooper*, 94 Ala. 178, 33 Am. St. Rep. 105, 11 South. 325, 16 L. R. A. 813; *Clemmons v. Cox*, 114 Ala. 350, 21 South. 426; *Ezzell v. Brown*, 121 Ala. 150, 25 South. 832.

The attachment of Peters was levied on the property by a constable, that of defendant by a sheriff, who took the property and sold it under both attachments, the defendant being the purchaser. On the undisputed facts, the plaintiff had the legal title to the property, and the right to its immediate possession and the possession of the constable and sheriff under the attachment writs, being illegal, the property was not, as contended by defendant, in the custody of the law: *Bissell v. Lindsay*, Ala. 162; *Governor v. Gibson*, 14 Ala. 326, 331; *Easley v. D.* 14 Ala. 158, 166; *Freeman on Executions*, sec. 268. "Any intermeddling with the property of another, or the exercise of dominion over it, whether by the defendant alone or in connection with others, in denial of the owner's rights, is a conversion, though the defendant had not (himself) the complete manucaption of the property": *Bolling v. Kirby*, 90 Ala. 224, 24 Am. St. Rep. 789, 7 South. 914; *Boutwell v. Parker*, Ala. 341, 27 South. 309.

If there was any error in overruling the demurrer to 12, it was error without injury, since the defendant in the end had the benefit under other pleas of the defense set up in plea.

The court charged the jury that if they believed the evidence they would find a verdict for the plaintiff, and assess the damages at the agreed value of the engine and boiler, with in

from the date of the levy by defendant until the trial, and in this charge we have been unable to discover any error.

Affirmed.

To Place Property in the Custody of the Law, a valid levy is essential: Cedar Rapids Pump Co. v. Miller, 105 Iowa, 674, 67 Am. St. Rep. 323, 75 N. W. 504. Property unlawfully or illegally taken is not in custodia legis: Gilman v. Williams, 7 Wis. 329, 76 Am. Dec. 219; Pitkin v. Burnham, 62 Neb. 385, 89 Am. St. Rep. 763, 87 N. W. 160, 55 L. R. A. 280.

The Conversion of Personal Property takes place whenever a person who is neither the owner nor entitled to the possession exercises dominion or control over it, inconsistent with or in defiance of the rights of a person who is either in possession or entitled to the immediate possession thereof: See the monographic note to Bolling v. Kirby, 24 Am. St. Rep. 795-819; Wing v. Milliken, 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138. See, also, Doolittle v. Shaw, 92 Iowa, 348, 54 Am. St. Rep. 562, 60 N. W. 621, 26 L. R. A. 366; Canning v. Owen, 22 E. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033; Johnson v. Wilson, 137 Ala. 468, 97 Am. St. Rep. 52, 34 South. 392; Rosencrantz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 97 Am. St. Rep. 609, 75 S. W. 445; Marshall etc. Grain Co. v. Kansas City etc. R. R. Co., 176 Mo. 480, 98 Am. St. Rep. 508, 75 S. W. 638.

The Rule of Caveat Emptor applies to purchasers at judicial sales: Hendrix v. Southern Ry. Co., 130 Ala. 205, 89 Am. St. Rep. 27, 30 South. 596; Hammond v. Chamberlain Banking House, 58 Neb. 445, 76 Am. St. Rep. 106, 78 N. W. 718. Compare People's Bank v. Bramlett, 58 S. C. 477, 79 Am. St. Rep. 855, 36 S. E. 912.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

GREEN v. LOS ANGELES TERMINAL RAILWAY CO.
[143 Cal. 31, 76 Pac. 719.]

RAILROAD TRACK—Negligence in Crossing.—One who steps upon a railroad track immediately in front of a train moving at an excessive speed, without giving the customary signals, but visible for the last eight hundred feet of its course, is guilty of contributory negligence, as a matter of law. (p. 74.)

NEGLIGENCE, CONTRIBUTORY—Concurrent Negligent Acts. The rule that a plaintiff's contributory negligence does not bar his right to recover where the defendant, after discovering his danger, fails to use ordinary care to avoid injuring him, has no application when both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it. (p. 75.)

RAILROAD TRACK—Person Crossing.—An Engineer may Assume that a person approaching the railroad is in the possession of her ordinary faculties, and will retain her position of safety and not recklessly expose herself to danger by crossing the track in front of the approaching train. He is not required, therefore, to check the speed of the train to enable her to cross in front of it, nor to ascertain whether she is about to do so; if, after she steps upon the track, he does all in his power to avert an accident, this is all the law requires. (pp. 78, 81.)

Gibbon, Thomas & Halstead, A. S. Halstead and Goodrich & McCutchen, for the appellant.

R. A. Ling and E. A. Meserve, for the respondent.

34 LORIGAN, J. This action is brought by plaintiff to recover damages for the death of his wife, alleged to have been occasioned through the negligent operation of a locomotive and train of cars by the employes of defendant, within the corporate limits of the city of Los Angeles.

The case was tried by the court without a jury, and judgment rendered in favor of plaintiff for five thousand dollars.

This appeal is from the judgment and from an order denying defendant's motion for a new trial.

These were both subsequently affirmed by this court in Bank, but, a rehearing having been granted, the matter is now again before us for disposition.

In our judgment, the sole point involved is whether the plaintiff's intestate was guilty of such contributory negligence as precludes a recovery by plaintiff, and we think that this point is fully presented, and is to be disposed of, under the findings of the lower court made in the case.

This matter was very fully discussed in the former opinion of this court above referred to, in considering the general finding of the lower court, that plaintiff's wife had used ordinary care and prudence, and had not been guilty of carelessness or negligence contributory to the accident in which she lost her life.

We are entirely satisfied with the views there expressed upon the doctrine of contributory negligence as applied to the general finding, and readopt them.

In this respect that opinion declared:

"The evidence, though sharply conflicting, is sufficient to support the findings of the superior court, that the train, considering the locality, was moving, at the time of the accident, at an excessively high and dangerous rate of speed (between twenty-five and thirty miles an hour), upon a descending grade, without steam, making but little noise, and without giving any of the statutory and customary signals, by sounding its whistle, or ringing its bell. But neither the evidence nor the specific findings of the court sustain the more general finding to the effect that plaintiff's wife in approaching ^{as} the track of defendant, at the place where she was killed, used ordinary care, and did that which an ordinary prudent person would have done under the circumstances, and did not by her own carelessness, or negligence, in any wise contribute to said accident or injury. The deceased was a woman of mature age, in good health, and in full possession of all her faculties. She approached the track of defendant on foot and by daylight, at a point from which it was plainly visible to a distance of eight hundred feet to the eastward, beyond which it made a curve to the north. When thirty feet distant from the track she was seen to look toward the east and then immediately advance

along a path which crossed the track at an angle of thirty degrees. As the track extended nearly east and west, and her course was from southeast to northwest, this caused her face to be turned partly away from the train, which was approaching from the east. It is to be inferred that when she looked toward the east from the point thirty feet distant from the track, the train had not rounded the curve and was out of view, for she advanced slowly along the path, without again looking up, and when in the act of stepping on the track was struck by the locomotive and killed.

"Under these circumstances it is clear, in view of numerous decisions of this court, and of the great weight of authority elsewhere, that she cannot be acquitted of culpable negligence directly contributing to the fatal result. While it is true that negligence is ordinarily a question of fact, it is, in some cases, a conclusion of law. In the case of *Herbert v. Southern Pac. Co.*, 121 Cal. 230, 53 Pac. 651, Justice Temple, delivering the opinion of the court, after laying down the general rule, stated the exception as follows:

"But cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and if any element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care, as well as the nature of it, has been ³⁶ settled.' To illustrate this view he proceeds as follows: 'The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains. What he must do in such a case must depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precaution.'

"The language here quoted, from one of our own decisions, is strictly applicable to the present case. If plaintiff's wife had taken the precaution to look, and had availed herself of every opportunity she had to look for the approaching train, she need not have been injured, and we are not obliged to resort

to any presumption to establish her failure to take the required precaution, for the evidence and the findings show that after looking along the track toward the east once, when she was thirty feet distant therefrom, she did not look again, but, turning her face in an opposite direction, walked so slowly that the train, coming from a point beyond her view at the time she looked, could travel over eight hundred feet while she was covering the thirty feet between her point of observation and the nearest rail of the track. The only answer of the respondent to the claim that this was negligence per se is, that the precaution she took would have been entirely sufficient if the train had not been running at a reckless rate of speed, and that she had a right to assume that it would only move at a lawful and proper rate. But this argument also is answered by the *Herbert case*, where Judge Temple, commenting on a similar contention, says: 'The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by plaintiff, if he were not also in default.' There is, in other words, no occasion for the application of the rule as to contributory negligence, except in cases where it is shown or assumed that the defendant has been guilty of actionable negligence. When such negligence is not shown, he is for that reason alone free from any liability, and only when it is shown has he any occasion to exonerate himself by proof of contributory negligence on the part of the plaintiff. It is no ³⁷ excuse, therefore, for plaintiff's wife that the train was running faster than was proper at that point. There was no law or ordinance restricting its speed to any particular rate, and if, as the trial judge concluded, the speed was, under the circumstances, excessive, a reasonably careful person would have guarded himself from the consequences of such negligence by the easy and simple precaution of looking, when about to pass from a position of safety to a position of danger. A person on foot, in possession of all his faculties, and in complete control of his own movements, stepping on a railroad track immediately in front of a train which has been moving eight hundred feet at a speed of less than thirty miles an hour, in full view, is clearly guilty of negligence. Upon this point the case of *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 167, 31 Pac. 835, is conclusive authority. There it was said: 'A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it,

to be struck by a passing train without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation is negligence per se.' This statement of the doctrine of negligence per se, made ten years ago, was based upon several decisions of this and other courts, cited in the opinion of Justice De Haven, and the rule has been applied in a number of more recent cases decided here: See *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651; *Bailey v. Market Street Ry. Co.*, 110 Cal. 329, 42 Pac. 914; *Lee v. Market Street Ry. Co.*, 135 Cal. 295, 67 Pac. 765; *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Warren v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926, and cases cited.

"In other jurisdictions the same doctrine has been frequently applied in cases closely resembling the present. These decisions have been cited in the briefs of counsel, and it is unnecessary to repeat the citations here, but we will quote the language used by the judges in one or two instances in discussing a state of facts substantially the same as those which we have before us.

as "Commenting upon a case in which the injured party had looked for an approaching train when some distance from the track and had then driven on without again looking, the supreme court of New Jersey says: 'If risk is inherent in a continuing state of things, the duty to exercise reasonable care is a continuing obligation. This at least must be true, that a man is negligent who attempts to drive across a railroad line after listening and looking only once toward a quarter from which a train may approach, if these acts of attention and observation are performed when the observer is so far from the crossing that before he will reach it a train coming from that quarter, and open to his further attention and observation, has time to advance so as to endanger him.' After citing several decisions to the same effect the court proceeds: 'These opinions show that persons who cross railroad tracks, either on foot or in vehicles, are strictly held to the duty of careful observation and attention. In each of these cases the plaintiff was injured notwithstanding some care on his part. In each case a judgment of nonsuit was sustained. In each case the defect in plaintiff's cause of action was the same. The defect was, that though he exercised care at first, he did not continue to be careful, but became inattentive

to his surroundings before he reached a place of safety': Winter v. New York etc. R. R. Co., 66 N. J. L. 677, 50 Atl. 339.

"In Central of Georgia Ry. Co. v. Forshee, 125 Ala. 199, 27 South. 1010, the supreme court of Alabama says: 'It is equally clear, on principle and authority, that this duty must be performed at such time and place, with reference to the particular situation in each case as will enable the traveler to accomplish the purpose the law has in view in its imposition upon him. He must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened, and his attempt to proceed across the track. If he stops so far from the railway as that a train, which could not be seen from that point, could and does reach the crossing by the time he has traversed the intervening distance and gotten on the track, he negligently contributes to the resulting collision and injury, and the same ³⁹ is true if, though he stop at the track, he lingers there after looking and listening, and delays crossing until a train not in sight or hearing when he stopped, looked, and listened has come meantime upon the scene, and collides with him when he does attempt to cross.'

"The court of appeals of New York, speaking of the duty of a person about to cross a railroad track, says: 'To be sure, the statute requires a railroad company to give specified warnings, but it neither takes away a man's senses nor excuses him from using them. The danger may be there; the precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in the very road of casualty': Wilds v. Hudson River R. R. Co., 24 N. Y. 430.

"The supreme court of Minnesota says: 'We are unable to find in the record any excuse for the intestate's disregard of his obvious duty to himself, to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track. Until then he had full control of his movements. He could by the slightest move of his head toward the east have discovered his hazard, and by the slightest check of his movements have avoided the same': Olson v. Northern Pac. R. R. Co., 84 Minn. 258, 87 N. W. 843.

"In all of the cases from which the foregoing quotations have been made, and in many others cited in the briefs, the negligence charged against the defendant, and proved or assumed for the

purpose of the decision, was excessive speed in the movement of trains, or omission of customary signals by sounding the whistle or ringing the bell—the same character of negligence, that is to say, which plaintiff contends excused his wife from looking a second time for the approach of the train. They therefore sustain both propositions laid down by Justice Temple in the Herbert case, as stated above, and in the absence of more direct authority to be found in our own decisions would warrant us in holding, if the question were a new one, that a person who with his eyes open steps upon a railroad track immediately in front of a moving train, visible from a point eight hundred feet distant from the point of collision, is necessarily, and as matter of law, guilty of contributory negligence.”

⁴⁰ The foregoing from the former opinion, in our judgment, contains an accurate statement of the evidence, a clear consideration and discussion of the findings, and correctly announces and applies the doctrine of contributory negligence to the case at bar, from all of which it appears that, while the defendant was guilty of negligence, plaintiff's intestate was likewise guilty of such contributory negligence as precluded a recovery by plaintiff.

Under such circumstances the judgment and order must be reversed, unless there is some other feature of the case presented by the findings upon which they can be sustained.

It is contended by respondent that such a feature exists, and that it arises from a special finding of the court—No. 7—which is as follows: “As said train rounded said curve and came upon said Humboldt street, going at a high and dangerous rate of speed, downhill, no bell on the engine thereof being rung, or other warning of its approach being given, the engineer in charge of the engine on said train saw said Bessie Green and knew that she was walking on said path, and crossing said Humboldt street, ahead of said train, and that she gave no evidence of knowledge of the approach of the train. That, notwithstanding such facts, said engineer did not slacken or lessen the speed of said train, or attempt to give said Bessie Green warning of its approach. That as, and just after said train crossed said Avenue 23, going toward said Bessie Green, and at such high rate of speed, said engineer still saw said Bessie Green, and still saw and knew she was advancing upon said track, and that she still gave no evidence of knowledge of the approach of said train, but said engineer still did not lessen the speed of said train, or blow a whistle or ring a bell, or give other warn-

ing of the approach of said train, nor was any given until the train was within ten or fifteen feet of the point of the accident. That said engineer could have stopped said train at any time within two hundred feet after starting to do so. That when within ten or fifteen feet from the place of such accident the engineer blew the whistle, applied the air-brakes, and reversed the engine, and did all in his power with the appliances he had to stop the train, and the fireman rang the bell."

Respondent's contention is, that while the general rule may be, that one cannot recover where his neglect contributed ⁴¹ proximately and directly to the accident, yet this rule is subject to the exception that where a defendant, discovering that a party has placed himself in a place of danger or peril, refuses or fails to do some act within his power which would have prevented or avoided the accident, then the defendant will be liable, notwithstanding the neglect of the plaintiff may have contributed to the injury, and contends that this finding presents such a condition as calls for the application of the exception to the general rule in the case at bar.

There is no question but that this exception to the general rule exists, and is usually extended to that limited class of cases where the failure to avoid the injury after discovery of the danger to plaintiff amounts to gross neglect and approaches actual wantonness on the part of the defendant. The rule on this subject is tersely and clearly stated in Shearman and Redfield on Negligence, section 99, as follows: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by defendant's neglect, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him."

It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do so something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it.

This whole subject is fully discussed in *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 169, 31 Pac. 835, where the plaintiff, walking up and down the defendant's track at a station while waiting for an approaching train, negligently remained

on the track and was struck by the locomotive. In discussing the liability of the defendant, notwithstanding plaintiff's contributory negligence, this court quotes the language of the supreme court of Maine in *v. McGlinchy*, 68 Me. 552, as follows: "But in cases within the foregoing description, where the negligent act of the plaintiff is distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is concluded that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property, is in some position of danger from a third party in contact with some agency under the control of the defendant, the plaintiff cannot, and the defendant can, prevent the injury. . . . But this principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. And, after quoting thus far from that decision, our court proceeds: "This, we think, may be regarded as a correct statement of the law upon this point, and as furnishing a clear and definite rule by which to determine in any case whether the negligence of the person injured may be said, in a legal sense, to have contributed to such injury; and when we apply this rule to the case here, it is at once seen that, even if it should be conceded that there was negligence upon the part of the defendant in its management of the train at the time of the accident preceding the accident, still the plaintiff would not be able to recover, as such accident could not have occurred but for the concurrent and active negligence of the deceased plaintiff at the time. The defendant was not the only one who could have prevented the accident, but, on the contrary, if the deceased plaintiff himself used ordinary care at the time, he could not have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the moment that he was struck by the engine, it was within his power to escape the injury which he received by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his negligence at the time in not looking or listening for the approach of the train."

The general rule and the exception are further fully

by Justice Angellotti in the recent case of *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15.

In the case at bar, however, giving the respondent the full benefit of any favorable deduction which can be made from ⁴³ the quoted finding, still it does not present any condition to which the exception to the general rule can apply.

All that this finding in effect declares is, that the defendant was guilty of negligence in failing to give the usual warnings and running its train at an excessive rate of speed; that the engineer saw Bessie Green approaching the track along a path which crossed it; that she gave no evidence of knowledge of the approach of the train; and that, notwithstanding such fact, the engineer did not slacken or lessen the speed of the train, or attempt to give said Bessie Green warning of his approach.

But during all this time, it will be observed, Bessie Green was in a position of absolute safety; she was not upon the defendant's track, but walking upon the pathway approaching it. There was nothing to indicate to the engineer that she would leave that place of safety and put herself in one of danger. The mere fact that she gave no evidence of a knowledge of the approach of the train while walking along the pathway toward the track did not indicate to the engineer that she was about to place herself in a position of peril. It is a matter of common observation that thousands of people daily cross in front of trains and approach crossings for that purpose, without giving any indication that they are aware of the coming of the train. They proceed, determining for themselves whether they have sufficient time to make the crossing safely or not, solicitous only for their personal safety, and giving no indication to the engineer whether they will hazard the risk of crossing, or pause until the train passes by, or in any manner indicating that they are aware of the approach of the train, or are concerned about it.

And as to this quoted finding there is nothing in it to indicate that as far as the engineer knew or could have known, Bessie Green might not have been perfectly well aware of the approach of the train and still have given no indication or manifestation of that knowledge. The law cast upon her the duty of looking to see, when approaching the point of danger, whether there was a train in sight which might prevent her crossing the track in safety, and the engineer had a right to assume that she had taken the precaution which the law required

to insure her own safety, was aware of the situation, ⁴⁴ and being in a place of safety would remain there and not pass to a point of danger.

And unless it can be said as a matter of law that it is the duty of an engineer to check his train when he sees one approaching a track and giving no indication of knowledge of the coming train, then this finding amounts simply to a finding that the engineer was negligent, which, of course, is conceded in the case.

This is not, however, the negligence which we are now discussing, and for which the defendant is claimed to be liable. Its liability is for negligence after the engineer had discovered that Bessie Green had placed herself in a position of actual danger.

During all the time that she was approaching along the pathway to the crossing she was in a position of absolute safety, and there is no rule of law which charged the engineer with knowledge that she was about to change her position of safety for one of peril. On the contrary, the engineer had a right to assume that she was in possession of her faculties and would retain her place of safety, and not recklessly expose herself to danger. To hold that the engineer, because she gave no indication of knowledge of the approach of the train was bound to assume that she would heedlessly leave a place of safety, put herself upon the track, and endanger her life, would be to revise the rule which, as far as we are advised, is universal in all jurisdictions, and certainly is the rule in this state, that where an engineer sees a person approaching a track he has the right to presume that the person is in possession of his ordinary faculties, alert to the danger which may ensue from passing trains, that he will not attempt to cross in view of the train, and is therefore not required to check the speed of the train to enable him to cross in front of it, or to ascertain whether he is about to do so.

In *Green v. Southern Pac. Co.*, 122 Cal. 565, 55 Pac. 579, an action brought to recover damages for the death of the husband killed at a crossing, this court says: "Unless the defendant knew, or had reason to believe, that the deceased was from some cause not possessed of the ordinary ability to care for himself, it had the right to presume that he possessed such ability and would take the ordinary precautions to protect ⁴⁵ himself from injury": See, also, *Holmes v. South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 Pac. 834.

And the general rule upon this subject is clearly expressed in *Olson v. Northern Pac. R. R. Co.*, 84 Minn. 258, 87 N. W. 843, heretofore referred to. That was a case where the deceased was killed in attempting to cross a railroad track, and the court in its decision comments on the facts and declares the rule of law applicable to them. It says: "We are unable to find in the record any excuse for intestate's disregard of his obvious duty to himself to use his eyesight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track.

"Until then he had full control of his movements. He could, by the slightest movement of his head toward the east, have discovered his hazard, and by the slightest check of his movements have avoided the same. Under such circumstances his obvious want of care must preclude a recovery in this case. . . . Plaintiff strenuously urges that, notwithstanding plaintiff's intestate may have been negligent, yet the servants in control of the engine of the freight train could, with ordinary care, have discovered his danger, and their failure to ring the bell, or make some effort to avoid the accident, after they could have seen intestate, authorizes the submission of the case, notwithstanding such contributory negligence. We are unable to adopt this view. The reasonable presumption that due care will be exercised by all persons in mutual relation when care is required is not a partial or one-sided doctrine, but applies to each alike. It seems clear to us that while the intestate might have the right to say that all signals should be observed by the defendant's servants in the exercise of ordinary care by such, the latter would also have the right to indulge in the same presumption with reference to the conduct of the unfortunate man who was deprived of his life by his own negligence, and presume that he would do his duty likewise. The engineer could not be held to suppose absolutely, as a matter of law, that a young man of good intelligence, with average faculties, before going on a railway crossing, would keep his head turned away from the direction in which a train might be approaching, when the slightest glance of the eye, even at the last moment, would apprise him of the danger, or the checking of his movements, upon ⁴⁶ the plainest dictates of common prudence, would have protected him from injury."

In the case of *Gahagan v. Boston etc. R. R. Co.*, 70 N. H. 441, 50 Atl. 846, 55 L. R. A. 426, which was likewise an action for injuries received at a crossing, the court, discussing the

reciprocal duties of pedestrians and railroad trains, uses the following language: "In the present case there is evidence that when the plaintiff was first seen by the engineer the collision could have been prevented. If the engineer knew, or ought to have known, then that the plaintiff would be upon the crossing when the train reached it, and could have avoided the collision, his failure to do so is the proximate cause of the injury. As there was evidence that the collision might have been prevented by him, the sole remaining question is whether, upon the evidence, reasonable men might find the engineer ought then to have foreseen the plaintiff's negligence. The bare fact that the plaintiff was seen approaching the track is not sufficient to authorize such a finding. If it were, the rule heretofore laid down, and found to be approved by the authorities and the reason of the case, that it is the duty of the highway traveler to stop and allow the train to pass, would be reversed. It would then become the duty of the train to stop and wait for the person on foot to go by. This would be unreasonable, impracticable, and put an end to the modern system of rapid transportation demanded by the public, and to effectuate which railroads are authorized by the state. The company's servant may ordinarily presume that a person apparently of full age and capacity, who is walking upon the track at some distance before the engine, will leave it in time to save himself from harm, or, if approaching the track, that he will stop if it becomes dangerous for him to cross it." To the like effect we assign a few other authorities: Beach on Contributory Negligence, sec. 394; Cleveland etc. Ry. Co. v. Miller, 149 Ind. 490, 49 N. E. 445; Guyer v. Missouri Pac. Ry. Co., 174 Mo. 344, 73 S. W. 584; Kirtley v. Chicago etc. Ry. Co., 65 Fed. 386; Boyd v. Wabash Western Ry. Co., 105 Mo. 371, 16 S. W. 909; Smith v. Norfolk etc. Ry. Co., 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287; McNab v. United Ry. etc. Co., 94 Md. 719, 51 Atl. 421; Rider v. Syracuse etc. Trans. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Jackson v. Kansas City etc. Ry. Co., 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32.

As the authorities thus declare that the engineer had a right ⁴⁷ to assume (as the court in this case found the fact to be) that Bessie Green was in the full possession of her natural faculties, and to further assume that as she was in a place of safety on the path she would not expose herself to the danger of attempting to cross the track, the question arises, When did Bessie Green placed herself in a position of danger, and when

she so placed herself did the plaintiff's employes exercise every effort to prevent injury to her? This question is answered both by the evidence and the findings. In the case at bar, as in the Minnesota case above quoted, it is apparent that Bessie Green was guilty of no contributory negligence up to the moment when she stepped upon the defendant's track in practically the actual presence of the approaching train. Until then she was in perfect safety, and, as said in the Minnesota case, "until then [which was to the very moment he stepped upon the main track] he had full control of his movements. He could by the slightest movement of his head toward the east have discovered his hazard, and by the slightest check of his movements have avoided the same."

Having then placed herself in a position of peril only from the moment she stepped from the pathway to the track, did the defendant's engineer, when her peril thus arose, have a clear opportunity of avoiding injuring her, and did he fail to do so? We are satisfied that this inquiry must be answered in the negative, and that this conclusion is irresistible when we consider the finding above quoted—special finding No. 7—in connection with another special finding—No. 6.

This last finding is, "That just as Bessie Green stepped upon defendant's track to cross the same, going as above described, she was struck by the engine of defendant's train, running down and along said track."

It is apparent from the quoted finding, No. 7, that from the moment the engineer discovered that Bessie Green was about to pass from the footway onto the track—from her place of safety to one of peril—he did all in his power to avert the accident, because it is expressly found, "that when within ten or fifteen feet from the place of such accident the engineer blew the whistle, applied the air-brakes and reversed the engine, and did all in his power, with the appliances he had to stop the train, and the fireman rang the bell."

48 Now, taking these findings together, it is quite clear that Bessie Green was guilty of contributory negligence in stepping from a point of safety to one of danger in the presence of the train, and without taking any of the ordinary precautions which the law cast upon her in her situation; that she was only placed in such peril at the moment when she stepped from her point of safety upon the pathway to the track; and that from the instant when she placed herself in that situation of peril, the defendant's employes did all in their power to

avert the accident, but without avail. This was all the required of them.

As, then, the special finding relied on by respondent is availing, considered in connection with the other findings take the case from the operation of the general rule, that contributory negligence will defeat a right of recovery, and it appears that the proximate cause of the death of Bessie G. was her own contributory negligence, the judgment in favor of the plaintiff cannot be sustained, and it, together with the order denying defendant's motion for a new trial, are reversed and the cause remanded.

McFarland, J., and Henshaw, J., concurred.

ANGELLOTTI, J., concurring. I concur. Further consideration of the second question discussed in the foregoing opinion—viz., the question as to the liability of the defendant notwithstanding the contributory negligence of the deceased has forced me to the conclusion that the case is not brought within the findings within the exception to the general rule that contributory negligence of the injured person will bar a recovery. My views upon this general question are fully set forth in the opinion in *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 St. Rep. 85, 74 Pac. 15.

Shaw, J., concurred with Angellotti, J.

BEATTY, C. J., dissenting. I dissent. This case cannot be distinguished on the facts from *Lee v. Market Street Ry.*, 135 Cal. 295, 67 Pac. 765. If the judgment in that case is founded upon a proper application of the doctrine of "last clear opportunity to avoid the injury," the judgment in this case should be affirmed. In my opinion delivered upon the former hearing, in commenting upon the facts quoted in the foregoing opinion of the court, I expressed the views to which I still adhere, as follows:

"The rule of law applicable to the facts thus found to be settled by a series of decisions of this court. In the recent of these cases (*Lee v. Market Street Ry. Co.*, 135 Cal. 295, 67 Pac. 765), it is briefly stated as follows: 'One having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in a position of danger by his own negligence.' This is almost a literal quotation from Justice Van Fleet's opinion

Fox v. Oakland Cons. St. Ry., 118 Cal. 62, 62 Am. St. Rep. 216, 50 Pac. 27, where in support of the rule a number of cases are cited from our own reports, including *Esrey v. Southern Pac. Co.*, 103 Cal. 543, 37 Pac. 501, in which case the rule is thus stated: 'He who last has a clear opportunity of avoiding the accident by the exercise of proper care to avoid injuring another must do so.'

"In section 99 of *Shearman and Redfield on Negligence* it is said: 'It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission after becoming aware of plaintiff's danger to use ordinary care for the purpose of avoiding injury to him.'

"This proposition is further amplified in the section cited, and the text is supported by a long array of decided cases: See, also, *Cooley on Torts*, 674.

"The essence of the doctrine seems to be, that contributory negligence of the plaintiff is not a defense in actions of this character, unless it is the proximate cause of the injury, and it is not such proximate cause when the defendant, after becoming aware of the danger plaintiff is in, or is evidently about to place himself in, could avert the consequence by the exercise of reasonable care. This sound and wholesome doctrine applies even in cases where no previous negligence on the part of the defendant has contributed to lull the plaintiff into a false security, and, a fortiori, it would have controlling force in a case like the present, where, as found by ⁵⁰ the court, the defendant was moving its train at an excessive and dangerous speed along a street of the city of Los Angeles without sounding bell or whistle and without the use of steam. According to the finding of the court, the engineer became aware of the danger into which plaintiff's wife was running, and might easily have avoided the collision by slackening the speed of the train or by warning her of her danger by giving the signals which, under the law, it was his duty to give."

VAN DYKE, J., dissenting. I dissent, on the grounds stated in the foregoing opinion of the chief justice.

For Recent Decisions upon the question involved in the principal case, see *McDermott v. Boston Elevated Ry. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E. 34; *Mitchell v. Illinois Cent. R. R. Co.*,

110 Ala. 630, 98 Am. St. Rep. 472, 34 South. 714; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15; *Passman v. West Jersey etc. R. R. Co.*, 68 N. J. L. 719, 96 Am. St. Rep. 573, 54 Atl. 809, 61 L. R. A. 609; *Kinter v. Pennsylvania R. R. Co.*, 204 Pa. St. 497, 93 Am. St. Rep. 795, 54 Atl. 276; *Day v. Boston etc. R. R. Co.*, 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771; *Cleveland etc. Ry. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E. 582.

DI NOLA v. ALLISON.

[148 Cal. 106, 76 Pac. 976.]

JUDGMENT as Evidence Pending Appeal.—If a defendant appeals from a judgment before a sheriff's deed is made to the plaintiff, or a sale made by him to a third person, the effect of the judgment as evidence of the matters determined by it is suspended, even though its execution is not stayed. (p. 88.)

JUDGMENT—Reversal as Affecting Judicial Sale.—If a mortgagee purchases the land at foreclosure, and sells it pending an appeal taken without a stay of execution, the title of his grantee, who is chargeable with notice of the defeasible title of his grantor, is defeated by a reversal of the judgment. (p. 89.)

JUDGMENT—Reversal as Affecting Judicial Sale.—The rights of one whose property has been sold under a judgment subsequently reversed, do not depend, in California, upon section 957 of the Code of Civil Procedure. That section is not restrictive of his rights, but is a remedial statute to be liberally construed. (p. 89.)

JUDGMENT—Reversal and Restitution.—Where a mortgagee purchases the land at foreclosure, and sells it pending appeal, his vendee cannot, on the reversal of the judgment, invoke the protection of section 957 of the California Code of Civil Procedure, which authorizes the court to make restitution so far as is consistent with the protection of a purchaser "at a sale ordered by the judgment." (p. 90.)

JUDGMENT—Reversal and Restitution.—If a mortgagee purchases the land at foreclosure, and sells it pending appeal, the reversal of the judgment restores the mortgagor to his original estate, and he does not need an order of restitution to enable him to assert his right thereto. Before the purchaser from the mortgagee can have his title quieted, he must establish a title in himself superior to that of the mortgagor. (p. 90.)

NEW TRIAL—Sufficiency of Statement.—An objection that the statement on motion for a new trial does not sufficiently specify the particulars in which the evidence is insufficient to justify the decision, will be overruled when it is stated therein: "The foregoing constitutes substantially all the evidence given upon the trial." (p. 91.)

Naphthaly, Freidenrich & Ackerman, Thomas B. Dozier and H. M. Barstow, for the appellant.

Charles W. Slack and Joseph E. Barry, for the respondent.

¹⁰⁸ HARRISON, C. Action to quiet title. Plaintiff's title is derived as follows: In 1892 the defendants, D. E. Allison, B. R. Sackett, and James Barron, were the owners of the land described in the complaint, and executed a mortgage thereon to Charles and Benjamin Golinsky. In 1893 the Golinskys brought an action for the foreclosure of this mortgage, in which they obtained judgment January 5, 1895, directing a sale of the lands in satisfaction of the mortgage debt. Under this judgment the land was sold August 24, 1895, to the plaintiffs in the action, and on March 3, 1896, they received a deed therefor from the officer who made the sale, and on March 24, 1896, they conveyed the land to the plaintiff herein. September 18, 1895, the defendants in the action appealed from the judgment, without giving any bond staying its execution, and on October 7, 1896, the judgment was reversed by this court: *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295. The plaintiff brought this action March 19, 1897. Judgment was rendered in his favor, from which and from an order denying a new trial the present appeal has been taken.

¹⁰⁹ The question presented by the appeal is whether the title taken by the plaintiff under the conveyance from the Golinskys was defeated by a reversal of the judgment under which their title was derived. It is contended by the appellant that at the time of the sale under the judgment the Golinskys took only a defeasible title to the land purchased by them, and that the effect of the reversal of the judgment was to set aside and vacate the sale; and that as they could not transfer to the plaintiff any greater interest than they themselves had, the title taken by him under the deed from them was also defeated. The respondent, on the other hand, contends that where the plaintiff purchases the defendant's property at a sale had under his own judgment, and, while the judgment is unreversed conveys it to a third person, the title of his grantee will not be affected by a subsequent reversal of the judgment; and in support of this proposition he relies upon section 957 of the Code of Civil Procedure, and has also cited several cases from other jurisdictions.

The rule is unquestioned that if a stranger to the action purchases the defendant's property at the execution sale, his title thereto will not be affected by a subsequent reversal of the judgment (*Freeman on Executions*, sec. 347); the chief ground therefor being that given in *Manning's Case*, 8 Coke, 96, that otherwise he would lose both his money and the land, and there would be no inducement to purchase at judicial sales. If the

purchase is made by the plaintiff in the action, under the great weight of authority, his title will be defeated by a subsequent reversal of the judgment. This rule was adopted in this state in *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. Whether the reversal of the judgment will affect the title of the grantee of the plaintiff who has thus purchased the land has been differently decided in different jurisdictions; in some by reason of statutory provisions, and in others depending upon the manner in which the question has been presented. In those jurisdictions in which it is held that the title of the plaintiff himself, who becomes the purchaser, is not affected by a reversal of the judgment, the courts necessarily hold that the title of his grantee will not be affected, and the cases cited therefrom (*Parker v. Anderson*, 5 T. B. 110 Mon. 445, and *Bickerstaff v. Dellinger*, 1 Murph. (5 N. C.) 272) need not be considered. In Nebraska it is provided by section 508 of the Code of Civil Procedure of that state that the reversal of a judgment "shall not defeat or affect the title of a purchaser" of land theretofore sold in satisfaction of such judgment, and in the case of *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358, cited by the respondent, the court invokes that provision in support of its decision. In some of the cases cited on behalf of the respondent the court has discussed and stated the general rules applicable to the title of property purchased under a judgment which is subsequently reversed, and the rule thus stated has been followed in those states, without any discussion of the principles upon which the rule is based, as authority in cases where the facts were widely different. For example, in *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449, which is referred to in subsequent cases in that state as the authority for their decision, the court says in its opinion: "The rights of third persons are not affected by the reversal." This expression was purely obiter, for the court held that *McJilton* was not a "third person," inasmuch as he had taken an assignment of the judgment and had control of the execution under which he had purchased the land. This case, however, is referred to as the authority for subsequent decisions in that state which hold that the grantee of a plaintiff who purchases at a sale under his own judgment is not affected by a reversal of the judgment.

Many of the cases cited by the respondent did not involve the rights of the purchaser at a "sale under a judgment" which was afterward reversed, but the purchase was made where the judgment had been a direct adjudication of the plaintiff's title

to the land. And in the greater number of the cases cited by him the purchase from the plaintiff was made before any step had been taken by the defendant for a reversal of the judgment, and the purchaser was protected in his purchase upon the ground that it was made on the faith of a judicial declaration that the title was in his vendor; that a defendant who permits a final judgment against him to remain of record without questioning its validity can invoke no equity in his favor for disputing the title of one ¹¹¹ who has purchased his property in reliance upon the correctness of that judgment: See *Hunt v. Loucks*, 38 Cal. 382, 99 Am. Dec. 404; *Rector v. Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277.

Horner v. Zimmerman, 45 Ill. 14, was a case of strict foreclosure of a mortgage, and after the decree had been entered the plaintiff conveyed the land to a third person. The bill of review under which the decree was reversed was not filed until two years thereafter. In *Wadhams v. Gay*, 73 Ill. 415, Flagler, under whom the defendants derived their title, had obtained a decree in 1854 declaring him to be the owner in fee of the land. The bill of review under which the decree was reversed was not brought until 1866. The court held that the purchases "intermediate the time of the rendition of the decree and the suing out of the writ of error," having been made in good faith for value, in reliance upon the validity of the decree, were entitled to be protected. In *Guiteau v. Wisely*, 47 Ill. 433, the judgment under which the land was sold was rendered in September, 1860, and at the sale in February, 1861, the plaintiffs became the purchasers. They assigned the certificate of sale March 14, 1862; and in November, 1863, the judgment was reversed upon a writ of error sued out by the administrator of the judgment debtor. The assignees of the certificate were held to be entitled to the same protection as if they had purchased at the sale. It does not appear at what time the writ of error was sued out, but as the judgment debtor died March 7, 1862, and letters of administration upon his estate could not have been granted until some time thereafter, it is reasonable to assume that it was later than March 14th, and that the assignees took the certificate without any notice that the defendants questioned the validity of the judgment. In *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383, the bill of review under which the decree was reversed was not filed until more than three years after the sale under the decree. Moreover, the court held in that case that Longworth, who purchased at the sale, was a "third person,"

and entitled to protection as such. What was decided in *v. Boyd*, 3 Ohio, 338, 17 Am. Dec. 603, is fairly expressed in syllabus as follows: "A party having title to land under a writ of ¹¹² in chancery conveys in good faith before citation of the writ is served, a reversal of the decree does not divest the purchaser of title." In *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 2d 100, the validity of the title transferred by the plaintiff, who had purchased at his own sale, was upheld on the ground that it was not to be defeated by a reversal of the decree on a writ of error issued fully a year after the date of the deed." In *Mack v. McClure*, 6 Blackf. 467, 39 Am. Dec. 441, it was held in the opinion that the land was conveyed "after the decree was rendered before the commencement of the suit in error."

None of the foregoing cases, however, or the principle governing them, have any application to a case where the defendant has appealed from the judgment before the sheriff's sale is executed to the plaintiff, or a sale made by him to a third person. By such appeal the effect of the judgment as evidence in the matters determined by it is suspended, even though its execution is not stayed: *Woodbury v. Bowman*, 13 Cal. 472, 34 Pac. 108; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *In re Blythe*, 98 Cal. 472, 34 Pac. 108.

As against the authorities cited by the respondent, the appellant has cited *Marks v. Cowles*, 61 Ala. 299, in which the facts upon which the decision was rendered were in principle identical with those presented in the present case. There, the land was sold in satisfaction of a money judgment and purchased by the plaintiff in the action. After it had been sold, and before the time for a conveyance, the defendant appealed from the judgment, but did not cause its execution to be superseded. Thereafter the purchaser received a conveyance of the land, and subsequently sold and conveyed it to a third person, a stranger to the action. After this conveyance the judgment under which the property was sold was reversed. The court held that the defendant was entitled to a restitution of the land, upon the ground that the purchaser from the plaintiff was chargeable with notice of the defeasible character of the title of his grantor, saying: "The judgment or decree must be shown necessarily as an indispensable element of the title of the defendant on the face of the title papers. And when it is shown, the defeasible character of the title appears, of which the vendee is bound to ¹¹³ take notice. . . . The right of a party aggrieved by an erroneous judgment to a restoration to the

tion in which he was when it was rendered—the prohibition against the use of such judgment by his adversary so as to derive advantages he cannot restore, would be of little avail if through the mechanism of an alienation to a party bound to know that the right and prohibition exists, it could be defeated,” and that a different rule would authorize a party to transfer a better and higher title than he acquired. We are of the opinion that the principles here declared correctly state the rule governing the decision to be rendered in the present case: See, also, *Freeman on Executions*, 3d ed., sec. 347; *Dembitz on Land Titles*, 1229; *Dunnington v. Elston*, 101 Ind. 373; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066.

The suggestion that this case was thus decided for the reason that there is no statute in Alabama declaring the rights of the parties or prescribing the procedure to be followed in case of a reversal of the judgment does not impair its weight as an authority. The rights of the defendant whose property has been taken upon a judgment which is subsequently reversed do not depend upon the provision of section 957 of the Code of Civil Procedure. That section is not restrictive of his rights, but is a remedial statute, and is to be liberally construed. The appellate court could have jurisdiction over only the parties before it, and would have no authority to restore to the defendant property over which the plaintiff had ceased to have any control. In *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459, the proceedings were instituted in the district court and the action of that court was upheld, not by reason of the statute, but by virtue of the inherent power in the court to make restitution of what had been lost by reason of its erroneous judgment: See, also, *Dater v. Troy Turnpike Co.*, 2 Hill, 629; *Gott v. Powell*, 41 Mo. 416.

Section 1049 of the Code of Civil Procedure declares: “An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.” Any alienation of the property involved in an action while it is pending is subject to the rights of the other ¹¹⁴ party, and will be subject to the judgment thereafter rendered in the case: 2 *Pomeroy’s Equity Jurisprudence*, sec. 637 et seq. It does not appear from the record herein whether a notice of lis pendens had been filed in the foreclosure suit, but it does appear that the plaintiff derived his title to the land through the sheriff’s deed to Golinsky, executed under the judgment in that

action. "The grantee is charged with notice of the deeds and documents from which he derails his title. When he chases from the plaintiff in the execution he is presumed to know the course of proceedings and state of the record from the title of his grantor proceeded, and he is presumed to know, that the right of the defendant is to take an appeal within the statutory period, and also the consequences of the successful prosecution of this right; and he must be supposed to purchase with reference to these things": *Reynolds v. Harris*, 11 Cal. 667, 76 Am. Dec. 459. See, also, 4 Kent's Commentaries Story's Equity Jurisprudence, sec. 400; Washburn on Property, sec. 2215; 2 Pomeroy's Equity Jurisprudence, sec. 101 et seq.; *Marks v. Cowles*, 61 Ala. 299; *Speck v. Riffin*, 4 Cal. 405; *Smith v. Cottrall*, 94 Ind. 379. The plaintiff was charged with notice at the time he purchased the land of the defect of Golinsky's title, and he was therefore put upon inquiry and bound by all the facts which such inquiry would have disclosed. Upon such inquiry he would have learned that Golinsky had purchased the land at a sale under a judgment in an action in which he was the plaintiff; that before the execution of the sheriff's deed under the sale the defendants had appealed from the judgment, and that the appeal was still pending thereby the validity of Golinsky's title to the property was questioned by the defendants in that action, and would be defeated by a reversal of the judgment.

Neither is the plaintiff herein in a position to invoke any protection under the provisions of section 957 of the Code of Procedure. By the terms of that section, as amended in 1880, the court is authorized to make restitution "so far as such restitution is consistent with protection of a purchaser who has purchased at a sale ordered by the judgment, or had under process upon the judgment." The plaintiff herein did not purchase the property "at a sale ordered by the judgment," ¹¹⁵ and the principles under which protection is given to strangers who purchase at judicial sales have no application. He did not purchase the property until after the sale had been completed and the execution of the sheriff's deed, and until after an appeal had been taken from the judgment, and he had become chargeable with notice of the defects in Golinsky's title. He is therefore not in a position to invoke any equity in his favor, to claim any protection from the restitution which Golinsky would have been required to make.

As the effect of the reversal of the judgment was to set aside the sale to the Golinskys, the appellant herein was thereby restored to his original estate in the land. He did not require any order of restitution from the court to enable him to assert his right to this estate, and it was incumbent upon the plaintiff herein, before he could have his title quieted, to establish a title in himself superior to that of the appellant: See *Black v. Vermont Marble Co.*, 137 Cal. 683, 70 Pac. 776.

Whether the appellant is estopped from objecting to the validity of the sale to the respondent cannot be determined upon this appeal. The record does not disclose any issue upon that proposition before the superior court (*Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673), and that court did not make any finding to that effect. Whether one is estopped by his conduct is a question of fact to be determined from the evidence in reference thereto. We cannot assume from the evidence before that court that it would have found that the appellant was so estopped, and it is not within the jurisdiction of this court to make a finding of fact from the evidence before that court.

The objection that the statement on motion for a new trial does not sufficiently specify the particulars in which the evidence is insufficient to justify the decision is overruled. It is stated therein, "The foregoing constitutes substantially all the evidence given upon the trial": See *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 64 Pac. 113.

We advise that the judgment and order denying a new trial be reversed.

Gray, C., and Chipman, C., concurred.

¹¹⁸ For the reasons stated in the foregoing opinion the judgment and order denying a new trial are reversed.

McFarland, J., Henshaw, J., Lorigan, J.

Hearing in Bank denied.

The Reversal of Judgments is the subject of a monographic note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124-146. A reference to page 137 of this note will show that when the plaintiff purchases at a judicial sale, he does so at the risk of losing his title on the reversal of the judgment. A different rule, however, prevails in some jurisdictions: *Blake v. Wolfe*, 111 Ky. 840, 98 Am. St. Rep. 434, 64 S. W. 910. See, in this connection, *Florence Cotton etc. Co. v. Louisville Banking Co.*, 138 Ala. 588, 100 Am. St. Rep. 50, 36 South. 456.

PEOPLE v. ADAMS.

[143 Cal. 208, 76 Pac. 954.]

JURY—Separation in Criminal Trial.—If, after the final submission of a criminal case, the officer in charge of the jurors separates them into three groups, and puts them in three different rooms on three different floors of a hotel, for eight or nine hours, the defendant is entitled, without an affirmative showing of prejudice, to a new trial. (p. 93.)

CRIMINAL TRIAL—Province of Judge and Jury.—The responsibility of determining whether or not the defendant in a criminal case should be found guilty rests entirely upon the jury, and the judge should be careful in his instructions, not to use language which might naturally be understood by the jury as intimating his opinion that the defendant is guilty, or as an argument against him. (p. 96.)

Henry C. Dibble and Dibble & Dibble, for the appellant.

U. S. Webb, attorney general, and J. C. Daly, deputy attorney general, for the respondent.

208 **McFARLAND, J.** The defendant was convicted of murder, the charge being that she murdered her infant child, a boy a little over two years old; and the prosecution contends that there was sufficient evidence to warrant the jury in finding that she willfully and feloniously caused the death of the child by giving it carbolic acid. Defendant contends that the **200** child took the poison accidentally, and without her knowledge. She appeals from the judgment and from an order denying her motion for a new trial.

The evidence on which the appellant was convicted was entirely circumstantial, and was undoubtedly conflicting, and she contends that it was insufficient to warrant the verdict; but it is not necessary for us to consider that point, because, in our opinion, a new trial must be granted on the ground of a separation of the jury after the case had been submitted to them.

The facts as to such separation are these: The cause was finally submitted to the jury on July 29, 1899, and the court directed the officer sworn to take charge of them to take them to their meals during the day, and in the evening "to lock them up for the night together in one room," and he "was specially enjoined by the court to keep them together during the time that they should be deliberating upon their verdict, and not to let them separate." Instead of doing as the court

directed, the officer, when night came, divided the jurors into three groups, and put them into three different rooms in a hotel, each room being on a different floor, or story; and they were thus separated and kept, not only in three different rooms, but on three different stories of the hotel, for about eight or nine hours. The officer testified that he locked the jurors in these separate rooms.

In some of the cases where this subject was involved courts had difficulty in determining whether the facts relied on constituted a "separation" within the meaning of the law; and it has been held that a mere momentary absence of one or two jurors, through necessity or accident, did not amount to such separation. But no such question arises in this case; there was here clearly a separation—the jurors having been willfully and intentionally kept apart in three separate groups for eight hours. Instead of sitting and consulting together as one jury, they were during this long time divided into three separate and distinct deliberative bodies, the members of each being prevented from conferring with those of either of the other two. Beyond doubt this was such a separation as the law forbids.

Under our law there is a marked difference between a separation during the progress of the trial and a separation after ²¹⁰ final submission of the case. As to the former there is no law requiring the jury to be kept together, although the court may order them to be so kept; and it is not necessary in the case at bar to consider the significance of a violation of such an order. But it is provided in the Penal Code (secs. 1128, 1135, 1136) that after the jury have finally retired for deliberation they must be kept together; and one of the express grounds for a new trial is "when the jury has separated without leave of the court after retiring to deliberate upon their verdict": Pen. Code, sec. 1181.

Whether such a gross violation of the law touching the separation of a jury as occurred in the case at bar should be held to be absolutely, and without any further inquiry, a cause for new trial, or whether the prosecution should be allowed to show, if it could, that nothing occurred during such extraordinary and prolonged separation prejudicial to defendant, is a question which does not here occur, for there was here no such showing. It is true that the officer testified that he "did not permit any person to speak to any member of the said jury," and did not permit any member of the jury "to speak to any person on any subject connected with the trial herein or about

the case at all"; but it is evident that this statement was of no value, for, in the first place, he could not have been present at the same time at all the rooms on the three different stories, if he had kept awake, and, in the second place, he himself went to bed during a part of the night. Certainly in this case—if the law would countenance an attempt to show absence of prejudice—nothing less than the affidavits of the jurors would be sufficient to establish that fact.

And it is clear that the burden was not on appellant of proving affirmatively that she was prejudiced by the said separation of the jury. In this state the law on the subject was first declared in *People v. Backus*, 5 Cal. 275. In that case the court recited that in certain states it had been held that a mere separation of the jury would not be ground for setting aside a verdict without a showing of improper influence, and that in other states it has been held that such separation did invalidate a verdict without any showing of actual improper influence. The court then says: "The latter rule we think is the correct one, because it would be impossible in almost ²¹¹ every case for the prisoner to establish the fact of any corrupt or improper communications between the jurors and others. This doctrine is substantially sustained by the supreme court of Massachusetts in the case of *Commonwealth v. Roby*, 12 Pick. 519, and in a late case (decided in Mississippi) *Orgon v. State*, 26 Miss. 78, in which the whole doctrine is reviewed. In the latter case the court says: 'If any separation is to be allowed without incurring the imputation of irregularity—for what length of time, and for what purpose may it be, how frequently may it be practiced, and to what distance may it extend—by what means are communications between the juror and other persons which may take place, and which must necessarily be secret, to be disclosed?' " In *People v. Brannigan*, 21 Cal. 338, the court decided that "where the jury in a criminal action, after having retired to deliberate upon their verdict, separated without permission of the court, the irregularity is sufficient ground for setting aside a verdict of guilty rendered by them, unless it be shown affirmatively by the prosecution that the defendant was not prejudiced thereby." In that case the court, by Field, C. J., said: "The district attorney appears to have considered it incumbent upon the prisoner to show affirmatively injury to himself resulting from the separation, or at least reason to suspect such injury. There are authorities which support this view. . . . But there are authorities of

equal weight the other way, and the latter, we think, are supported by better reasons." Many cases are cited in the opinion, and, among others, *State v. Prescott*, 7 N. H. 287, where the court say: "The prisoner is in such case entitled, as a matter of right, to require, in the first instance, a compliance with the ordinary forms provided by the law to secure to him a fair and impartial trial; and if the guards provided for his security are neglected, or disregarded, he is at least entitled to require, at the hands of the government, satisfactory evidence that he has not received detriment by reason of such neglect and is not to be put to show, affirmatively, that such departure from the customary mode of trial has been the probable cause of his conviction." In *People v. Hawley*, 111 Cal. 78, 43 Pac. 404, it was held that a separation of a jury after the final submission in a criminal case vitiated the verdict, even though the defendant had consented to the separation. The court there say: 212 "The separation of the jury after they are sworn, even during the trial, was never permitted at common law in cases of felony, and in many states is not now permitted in capital cases. Our statute permits such separation in all cases before the submission of the case, in the discretion of the court, but expressly provides that after retiring to deliberate upon their verdict, they must be kept together: Pen. Code, sec. 1128. The court, therefore, had no authority, either under the statute or at common law, to permit the separation; nor could the consent of the defendant or his counsel operate to empower or excuse the violation of an express provision of the statute." Many cases are cited and quoted from in the opinion, and, among others, *Peiffer v. Commonwealth*, 15 Pa. St. 468, 53 Am. Dec. 605, where the eminent Chief Justice Gibson, delivering the opinion of the court, said: "Even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance. It is not too much to say that if it were abolished few influential culprits would be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction." The authorities on the subject are very fully collated in *Spelling's New Trial and Appellate Practice*, commencing at section 151, and also at section 59.

The foregoing cases established the law in this state as above stated. The only case cited by respondent is *Saltzman v. Sunset Tel. etc. Co.*, 125 Cal. 501, 58 Pac. 169. That was a

civil case, and the court in its opinion calls attention to the fact that while the separation of the jury after submission is a ground for a new trial in a criminal case, there is no provision as to a civil case. In a civil case the separation of the jury can be considered on motion for a new trial on the general ground of "misconduct." In the *Saltzman* case the officer in charge had allowed one juror to communicate for a few minutes to an outside party through a telephone which was in the room where all the other jurors were; there was really no separation of the jury. The officer was beside the juror and heard all he said through the telephone, and it was shown by affidavits that the communication was to the juror's family, and entirely about private matters. It was held that it sufficiently appeared that the misconduct was without significance. But the law, even in civil cases, was there announced as follows: "The rule in this state is to take it to be, in civil cases, that a separation against the instruction of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to rebut the presumption and show that no such attempt was made. I think that was done in this case." The circumstances in a separation in a particular case might possibly be such as to themselves show that no prejudice to the defendant could result, and in such case a court perhaps would be warranted in upholding the verdict notwithstanding the direct violation of an express provision of the code intended for the protection of a defendant; but we need not pass upon that question, for it does not arise in the case at bar. On account of the separation of the jury shown in the present case the order denying a new trial must be reversed.

There are no other points necessary to be determined. It is contended that instruction No. 10, upon the subject of circumstantial evidence, is erroneous within the rule declared in *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 111; but it is not necessary to definitely determine the question. If upon another trial the court deems it proper to instruct at all upon the subject of circumstantial evidence, it can easily modify the instruction so as to avoid the criticism of the appellant's counsel. It may be said, generally, that the responsibility of determining whether or not a defendant in a criminal case should be found guilty rests entirely upon the jury, and not upon the presiding judge, not having that responsibility, and

prohibited by our constitution from charging as to matters of fact, should be careful, in instructing, not to use language which might be naturally understood by the jury as intimating his opinion that the defendant was guilty, or as an argument against him.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

Shaw, J., Angellotti, J., Van Dyke, J., Henshaw, J., and Lorigan, J., concurred.

The Effect of the Separation of the Jury in criminal trials is discussed in the monographic notes to *McKinney v. People*, 43 Am. Dec. 75-87; *State v. State*, 60 Am. Rep. 73-75. Ordinarily, the separation of jurors further than is necessarily required to enable them to perform their duties as such, and under the care of a sworn officer, creates a presumption of improper influence, but this presumption may be rebutted by clear and convincing proof: *Commonwealth v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670, 37 Atl. 521.

WRIGHT v. AUSTIN.

[143 Cal. 236, 76 Pac. 1023.]

HIGHWAY—Rights in Acquired by Public.—By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, which incidents do not embrace the subterranean waters of the road. (p. 99.)

HIGHWAY—Percolating Water, Injunction Against Using.—The public authorities may be enjoined, at the suit of the owner of the fee, from taking the subterranean waters from a highway to sprinkle it. (p. 101.)

Butts & Weske, for the appellants.

C. H. Pond and R. L. Thompson, for the respondents.

²³⁷ **CHIPMAN, C.** The case is here on appeal from a judgment on an agreed statement of facts. Plaintiffs are, and have been for many years, the owners of the premises described in the complaint, situated in Santa Rosa road district, Sonoma county. Along the northerly side of said lands there is a public highway which has been in use as such for more ²³⁸ than thirty years, and occupies a strip of land twenty-five feet wide, and the center line of the road is the north boundary line of plaintiff's land; defendants are the board of super-
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visors of said county and the ex-officio road commiss of the said road district; on May 27, 1903, defendant their official capacity, without the consent of plaintiffs, upon said strip of land, erected machinery for the pu of boring a well on said highway about four or five feet the southerly line thereof, and where said highway ran and over plaintiffs' land. This well was six inches in dian and was bored to the depth of forty-four feet, and an pipe or casing placed therein, and defendants erected over well a windmill and pump and water-tank. This well bored and the pump and tank were erected "for the purpo obtaining water from said well to sprinkle and keep in r said public road"; the plant was so erected as not to inte in any way with the free use and enjoyment by the public of highway; "said highway was not out of repair at the where said well was bored, . . . and said well was not for the purpose of getting soil to repair said highway, but bored solely for the purpose of getting water to sprinkle highway and thereby to prevent the same from getting out pair and to render it more fit and convenient for public. The water "sought to be taken from said well is such as flo percolates through the soil of said premises at a depth of twenty to forty-four feet from the surface of the ground." is further stipulated that the defendants "threaten to and operate said pump, windmill, and waterworks, and take ar move from said well large quantities of water, which flow percolates through the side of said premises into said well use the same upon said highway, unless restrained by injur of this court."

There is no stipulation as to whether plaintiffs were m any use of the percolating waters subterranean of their or as to the damages alleged.

Plaintiffs appeal from the judgment given in defend favor.

Section 2631 of the Political Code reads: "By taking c cepting land for a highway, the public acquire only the ²³⁰ of way, and the incidents necessary to enjoying and mainta the same, subject to the regulations in this and the Civil provided."

This is but the formulation of the general rule laid in the books and decided cases when treating of highwa easements, which they are.

Speaking of the rights retained by the adjacent owner, Parker, C. J., in *Tucker v. Tower*, 9 Pick. 109, 19 Am. Dec. 350, said: "It is too clear to require any discussion that the proprietor of land over which a public highway has been laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public." The question here raised has, in one form or another, been before the courts frequently, and it will be found that the decisions invariably turn upon what may reasonably be said to be "incident" to either the construction, repair, or maintenance of the road constructed over the right of way. The decided cases (and they are numerous) are illustrative of the principle declared in the code, but in none of the cases cited, and in none we have been able to find, has it been held that the easement or the dominant tenement draws to it the right, as an incident, to bore or dig wells along the right of way for the purpose above stated.

It was said in *Burris v. People's Ditch Co.*, 104 Cal. 248, 37 Pac. 922: "It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance."

In *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 Pac. 69, it was said: "Every easement includes what are termed 'secondary easements'; that is, the right to do such things as are necessary for the full enjoyment of the easement itself, but this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former. The owner cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use."

²⁴⁰ If we are to hold that the county may dig or bore wells, and to any depth necessary to obtain water at convenient distances along the highways, for the purposes named, it must be because it has the right as an incident to the principal object, which is to establish a highway, and as necessary to that object. And the right would not depend on the fact that the owner of the servient tenement was not at the time using the water or contemplating its use. Should he find it necessary to use the percolating waters in his land adjacent

to the highway, and should it be found that the wells in the highway diminished his flow of water materially, the county would still have the right to a just apportionment of the water if respondent's contention be sound, and if the percolating waters pass as incident to the easement. In other words, it must be held that the percolating waters under the surface of a highway are acquired as incident to the easement, and are a part of the grant or use, at least to the extent needed to sprinkle the highway, and that to that extent these waters do not belong to the owner of the servient tenement. A very small mileage of the public roads of the country are sprinkled with water as a means of preservation. Doubtless, such use of water on some roads is desirable in maintaining them and adds to their convenient use, but it can hardly be said generally that the sprinkling of roads is necessary to their maintenance.

In *Town of Suffield v. Hathaway*, 44 Conn. 521, 26 Pac. 483, it was held that the selectmen of a town have no right as against an owner of land on the highway to divert the water from a spring on such owner's side of the highway to a public watering trough on the other side. *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263, was cited approvingly where it was said: "When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains the exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way." In the *Suffield* case, *Woodruff v. Neal*, 28 Conn. 167, was also cited, where it was said to be well established, "In conformity with the principles of the common ²⁴¹ law, that a highway is simply an easement or servitude, conferring upon the public only the right of passage over the land on which it is laid out, and as an incident of such right that of using the soil or material upon it in a reasonable manner for the purpose of making and repairing it. . . . Subject to this right of the public, he may take trees growing upon the land, occupy mines, sink watercourses under it, and generally has a right to every use and profit which can be derived from it consistent with the easement, and when disseised (as he may be) can maintain ejectment, and recover possession subject to the easement, and can also maintain trespass for any act done to the land not necessary for the enjoyment of the easement, which would be an actionable injury if the

land was not covered by a highway." The right of the owner of the fee to whatever may be said to belong to the owner of the land necessarily draws to it the right of appropriation and use at all times, subject only to such rights as go with the easement. At least as between the parties to this action, the percolating waters of the land are property in the same sense as are mines, quarries, springs, and the like, and plaintiffs' right thereto is unaffected by the easement, unless it be true that defendants may, as of right, bore down to and draw the water from its subterranean sources for the purposes named. But we think that defendants have not that right, and it therefore becomes immaterial whether plaintiffs are now using the water or that they are not now specially damaged by defendants' use. In our opinion, the subterranean water underlying a highway cannot reasonably be said to be one of the "incidents necessary to enjoying and maintaining the same" any more than can the waters of a spring be said to be an incident to the easement. The county is not without authority to provide means for making the roadway more convenient by sprinkling, or to thus provide for its enjoyment and maintenance. Subdivision 10 of section 2643 of the Political Code provides: "For the purpose of sprinkling the roads in any part of the county with oil or water, the board of supervisors may erect and maintain waterworks and oil-tanks and reservoirs, and for such purposes may purchase or lease real or personal property," the cost to "be charged to the general county fund, the general road fund, or the district fund of the district or districts benefited."

242 This statute indicates that the legislature deemed it necessary to provide some further authority for sprinkling the highways than was given in section 2631 of the Political Code. The statute referred to at least would seem to corroborate the view we have taken of that section.

The court said in *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498, and note: "The courts have held that where, to reach and prepare the surface of the road in accordance with its grade line, superincumbent material is necessarily removed, it may be used upon other parts of the road, and upon the premises of other land owners; and that, where there has been no negligence in construction, consequential injuries necessarily resulting cannot be recovered. It was said in *Pumpelly v. Green Bay Co.*, 13 Wall. 181, 20 L. ed. 557, that this class of decisions 'have gone to the uttermost limit of sound judicial construction,'

and 'in some cases beyond it.' The observation was just. To take merely an easement in land, leaving the fee in the owner, and then, by advancing stages of judicial endurance sap the value and utility of the fee by adding its benefits to the easements, is scarcely consistent with the policy which is at the same time sedulously protecting the right of abutters having no fee in the street whatever, to their easements of light and air and access."

In the case cited pits were dug for gravel with which to cover the roadway, and for this reason defendants claim that the case is not in point. But would it have been less so if the gravel had been obtained by sinking shafts and mining for it in such manner as not to interfere with the surface of the roadway? The question always recurs, What incidents pass with the easement, and what rights go as incidents? The diligence of counsel (and the briefs on both sides cite cases copiously), aided by our own research, has failed to disclose a case where it has been held that the easement brings with it the right to penetrate the earth along the highway to an indefinite extent for materials with which to construct and maintain it.

Upon the facts as stipulated we think the judgment as entered should be reversed, and judgment should be for the plaintiff as prayed for in the complaint, restraining defendants "from taking, appropriating, or removing the percolating ²⁴³ waters from plaintiffs' said lands," described in the complaint. It is accordingly so advised.

Cooper, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, with directions to enter judgment in favor of plaintiffs as prayed for in the complaint, restraining defendants from taking, appropriating, or removing the percolating waters from plaintiffs' said lands, described in the complaint.

McFarland, J., Lorigan, J., Henshaw, J.

RIGHTS, OBLIGATIONS, AND REMEDIES OF PERSONS OVER WHOSE LAND A PUBLIC HIGHWAY RUNS.*

I. Title and Fee to Soil.

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b. Transfer, Merger and Ouster, 105.

*REFERENCE TO MONOGRAPHIC NOTE.

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I. Title and Fee to Soil.

a. **Ownership.**—When a highway is laid out over private property, the owner is not thereby deprived of his title to the land covered by the road. The public acquires only an easement of passage, with the rights and incidents thereto, while the owner retains the fee to the soil for all purposes not incompatible with the enjoyment of the easement secured by the public: *Brown v. Freeman*, 1 Root (Conn.), 118; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; *Hagaman v. Moore*, 24 Ind. 496; *Dubuque v. Maloney*, 9 Iowa, 450, 74 Am. Dec. 358; *Commissioners of Shawnee County v. Beckwith*, 10 Kan. 603; *Seamen v. Huffaker*, 21 Kan. 254; *Small v. Pennell*, 31 Me. 267; *Town of Galen v. Plank Road Co.*, 27 Barb. 543; *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Higgins v. Reynolds*, 31 N. Y. 151; *State v. Hewell*, 90 N. C. 705; *Phillips v. Dunkirk etc. R. R. Co.*, 78 Pa. St. 177; *Charleston Rice Milling Co. v. Bennett*, 18 S. C. 254; *Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856; *United States v. Harris*, 1 Sum. 21, Fed. Cas. No. 15,315.

“By the location of a way over the land of any person, the public have acquired an easement which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although encumbered with a way. And every use to which the land may be applied, and all the profits which

may be derived from it, consistently with the continuance of easement, the owner can lawfully claim": *Perley v. Chan*, Mass. 453, 4 Am. Dec. 159. "The owner parts with the use for if the road is vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway entitled to the timber and grass which may grow upon the soil and to all minerals which may be found below it": *Barre v. Howell*, 6 Pet. 498, 512. "He has all above and all under the ground except the right of way in the public": *Overman v. May*, 35 89, 97. "The right of the owner may grow less and less as public needs increase. But at all times he retains all that is needed for public uses, subject, however, to municipal or police regulations": *Burr v. Stevens*, 90 Me. 500, 38 Atl. 547; *Allen v. F*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519.

The legislature is competent to provide for taking the fee to be appropriated, and divesting the owner of all proprietary interest therein: *Board of Supervisors v. Sea View Ry. Co.*, 23 Hun 400, and, of course, the fee to the soil in a public highway is not necessarily and under all circumstances in the adjoining owner: *City v. Danbury Public Hall Co.*, 35 Conn. 430; *Alling v. Burlo*, Conn. 504; *Benthrop v. Bourg*, 4 Mart. (La.) 136; *Mott v. Cl*, 41 N. Y. Supp. 87, 9 App. Div. 181; *Mitchell v. Einstein*, 86 Supp. 759, 42 Misc. Rep. 358. But, *prima facie*, the adjoining proprietors each own to the middle of the highway; or if the same person owns on both sides, he owns the whole road, subject to the public easement of passage in either case: *Town of Chatham*, 11 60; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 2; *Copp v. Neal*, 7 N. H. 275; *Myer v. Bell Tel. Co.*, 82 N. Y. 83, 83 App. Div. 623; *Dell Rapids Mercantile Co. v. Dell Rapids*, S. Dak. 116, 74 Am. St. Rep. 783, 75 N. W. 898; *Western Union Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 100 B. A. 429. A grant of lands bounded by a highway is presumed to carry with it the fee to the center of the road, for ordinarily there is no object or purpose to be subserved by the owner retaining title to the highway when he has parted with the ownership of the adjoining land: *Hunt v. Rich*, 38 Me. 195; *McKenzie v. Gleason*, Mass. 452, 100 Am. St. Rep. 566, 63 N. E. 1076; *Winter v. Pe*, 24 N. J. L. 524, 61 Am. Dec. 678. This presumption does not avail, however, when the sovereign or the public authorities are with the fee of the highway: *Paige v. Schenectady Ry. Co.*, 10 Y. Supp. 889, 38 Misc. Rep. 384. And it is rebutted by the condition of a deed from which the owner derives his title, granting land to the side of the road only: *Smith v. Slocomb*, 77 Mass. (Gray) 280. See, also, *McKenzie v. Gleason*, 184 Mass. 452, 11 8 St. Rep. 566, 63 N. E. 1076; *Jackson v. Hathaway*, 15 John 8 Am. Dec. 263.

b. **Transfer, Merger and Ouster.**—A covenant of seisin is not broken, it seems, by an encumbrance such as a highway: *Vaughn v. Stuzaker*, 16 Ind. 338. By the transfer of a turnpike road from the public to a private corporation, the title of the soil is not changed, but remains in the adjoining owners: *Douglas v. Turnpike Road Co.*, 22 Md. 219, 85 Am. Dec. 647.

Upon the acquisition by the commonwealth of land over which a highway has been located, the easement of the highway is not merged in the estate which the commonwealth acquires in the land: *People v. County of Marin*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659.

The owner of the fee to land on which there is a public highway may be barred of his title thereto by the adverse possession of another for the statutory period. And the private rights of an abutting owner in the highway may be lost through adverse possession: See the monographic note to *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 778. The public easement, however, cannot be extinguished by operation of the statute of limitations: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-494.

II. Easement or Right of Way.

a. **In General.**—When a highway is laid out over private property, the public acquires an easement of passage thereon; but ordinarily it acquires no greater interest therein than a right of way, with the powers and privileges incident to that right. Subject to this easement, as has already been seen, the interest of the owner of the fee remains unimpaired: *Town of Palatine v. Kreuger*, 121 Ill. 72, 12 N. E. 75; *Stinson v. Gardiner*, 42 Mo. 248, 66 Am. Dec. 231; *Ellsworth v. Lord*, 40 Minn. 337, 42 N. W. 389; *Williams v. Natural Bridge Plank Road*, 21 Mo. 580; *Trustees of Presbyterian Soc. v. Auburn etc. R. R. Co.*, 8 Hill, 567; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138.

b. **Width and Alteration of Traveled Way.**—Since the fee to the soil of a highway is in the adjoining owner, it follows that a private individual may be held liable as a trespasser by the owner of land over which a highway runs, for acts causing injury to the latter in widening or repairing the highway outside its traveled portion, although the public authorities might have lawfully done the same acts: *Hollenbeck v. Rowley*, 8 Allen, 473. So, one adjoining owner cannot build a driveway upon the land of another, within the limits of the highway but outside the wrought portion, for his private convenience in passing from his land to the highway: *Burr v. Stevens*, 90 Me. 500, 33 Atl. 547. Said the court: "The defendant had no right to build a driveway upon this land of the plaintiff, although within the limits of the highway, for his private use and convenience. In the use of this driveway he was not a traveler upon the public highway, but it was built and used by him for his private

convenience because of the difficulty of passing directly from land to the highway."

The public, in their use of a road, are not confined to the use of the actual beaten path, even where the easement has been acquired by user: *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, 44 Pac. 1032. Yet if a traveler, without necessity, drives aside the uniform beaten path of a highway for the express purpose of injuring the grass along the roadside, he is answerable to the abutting owner: *People v. Foss*, 80 Mich. 559, 20 Am. Rep. 532, 45 N. W. 480.

A land owner, who, by permission of a turnpike company, alters the grade of a public highway on his land, assumes the duty and obligation of such company to make the altered road suitable and safe for public travel: *Horstick v. Dunkle*, 145 Pa. St. 220, 23 St. Rep. 685, 23 Atl. 378.

III. Rights and Privileges Peculiar to Owner.

a. *As Distinguished from Other Persons*.—Undoubtedly the owner of property abutting on a public highway, whether or not he pays the fee to the middle of the road, has rights therein not common with the general public for purposes of travel as in *Town of Longmont v. Parker*, 14 Colo. 386, 20 Am. St. Rep. 23 Pac. 443; *Bradley v. Pharr*, 45 La. Ann. 426, 12 South. 618. His interest in the street which is peculiar and personal to the abutting lot owner, and which is distinct and different from that of the general public, is the right to have free access over it to his building, substantially in the manner he would have enjoyed the right in case there had been no interference with the street by the street car etc. *Ry. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225, 14 Ind. 467; *Pittsburgh etc. Ry. Co. v. Noffsger*, 148 Ind. 101, 41 Ind. 332; "Obstructions, Encroachments, and Nuisances," where the law accords the owner of the fee broader rights than those of merely an abutting owner. "The ownership of the fee of a street has a substantial value in the abutting property because of the degree of control it gives to him over the uses to which the street may be put. It vests him with the right to defend the street and to enjoin a use of or an encroachment upon the street by legislative or municipal authority, for purposes inconsistent with those uses to which streets should be or have been ordinarily put, excepted, unless just compensation is provided to be made. His ownership of the land in the street is subject only to the public use therein as a highway. In the absence of such a provision for compensation, the taking of the street for some new or additional use inconsistent with its ordinary use would be illegal. But if the abutting owner does not own the fee in the land of his street, he has no right to compensation, and is remediless against a taking of the street under legislative or municipal sanction for other uses."

such other uses be unreasonable, and in their nature so improper as to obstruct a free passage upon the street, or to amount to a nuisance, or to deprive him of the enjoyment of easements of light, air and access. As to any such improper or unreasonable use of a street, the abutting property owner would undoubtedly have the right to come into a court of equity and to claim its intervention to protect his general rights": *Buffalo v. Pratt*, 131 N. Y. 293, 27 Am. St. Rep. 592, 30 N. E. 233, 15 L. R. A. 413.

A traveler along a public highway may not have a right to turn aside and remove a fence standing within its lines which does not obstruct the general use of it nor interfere with him; while adjoining owner may have such a right, for he has a right to reasonable access from his premises to the traveled part of the road: *Hubbard v. Deming*, 21 Conn. 356.

b. *Use of Road for Private Purposes.*—The owner of the soil over which a public way passes may make a reasonable use of the land above and below the surface, so long as he does not incommode the public or impair the usefulness of the way: *Farnsworth v. Rockland*, 83 Me. 508, 22 Atl. 394; *Clark v. Lake St. Clair etc. Ice Co.*, 24 Mich. 508. He may use a reasonable portion of the highway, temporarily, for the deposit of lumber, building materials, etc.: *Chamberlain v. Enfield*, 43 N. H. 356; *Mallory v. Griffey*, 85 Pa. St. 275; *North Manheim Township v. Arnold*, 119 Pa. St. 380, 4 Am. St. Rep. 650, 13 Atl. 444; *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048. But see *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 76 Conn. 311, 100 Am. St. Rep. 994, 56 Atl. 512.

The owner of a lumber-yard, however, cannot permanently use a road to pile lumber in: *Busse v. Rogers (Wis.)*, 98 N. W. 219. An abutting owner has a right to a passway beneath the surface of the highway: *Pemberton v. Dooly*, 43 Mo. App. 176. And he may excavate under the street or highway, and use the space, when he does not thereby interfere with the public convenience: *McCarthy v. Syracuse*, 46 N. Y. 194; *Papworth v. Milwaukee*, 64 Wis. 389, 25 N. W. 431. It seems, too, that an abutting owner may lawfully place a stepping-stone in the street: *Teager v. Flemingsburg*, 109 Ky. 746, 95 Am. St. Rep. 400, 60 S. W. 718, 53 L. R. A. 791; *Robert v. Powell*, 168 N. Y. 411, 85 Am. St. Rep. 673, 61 N. E. 699, 55 L. R. A. 775; or construct an area in front of his premises: *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. Dak. 116, 74 Am. St. Rep. 783, 75 N. W. 898.

But the primary object of public streets and highways is to furnish a passageway for travelers; and while they may be put to other uses, they must be enjoyed in subordination to this primary object: *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820. The owner of the soil cannot appropriate a highway for private purposes to the detriment of the public right of passage: *Bohne v. Blankenship*, 25 Ky. Law Rep. 1645, 77 S. W. 919. He cannot impede or

obstruct a road terminating at a navigable river, and intended as a means of public communication between the river and the country adjoining, by erecting a wharf, and filling it up so as to raise the terminus of the road from the edge of the water to the top of the wharf: *Balliet v. Commonwealth*, 17 Pa. St. 509, 55 Am. Dec. 581.

In respect to frightening horses, the general rule is, that a property owner, who has a lawful right to expose an object on or along a public highway, within view of passing horses, for a temporary purpose, is bound only to take care that it shall not be calculated to frighten ordinarily gentle and well-trained horses: *Piolet v. Summers*, 106 Pa. St. 95, 51 Am. Rep. 496. The object in question in this case was a small barrel, mounted on wheels, and used in whitewashing the road fence. In *Lynn v. Hooper*, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752, it was held unlawful for a land owner to place a hay cap over a bunch of hay within the limits of the highway, giving the appearance of a small white tent.

c. *Maintenance of Fences and Gates.*—Land owners cannot, as a rule, erect and maintain gates across a highway for the purpose of protecting their property: *Turpin v. Dennis*, 139 Ill. 274, 28 N. E. 1065; *Henby v. Ripley Township*, 10 Ind. 45. The public, however, may authorize this to be done: *Hunsicker v. Briscoe*, 12 La. Ann. 169. And when a board of supervisors, in pursuance of a statute, authorize a person to place gates across a road which runs through his land, this authorization, while it should not be withdrawn capriciously to the injury of the one who has acted under the license, may, nevertheless, be revoked: *Teague v. Board of Supervisors*, 56 Miss. 29. The owner of land through which a pent road runs may erect gates and bars for the protection of his crops, so long as they do not interfere with the reasonable use of the way as a pent road: *Wolcott v. Whitcomb*, 40 Vt. 40; *Carpenter v. Cook*, 67 Vt. 102, 30 Atl. 998.

A person owning land on both sides of a highway crossed by a creek, spanned by a bridge, has no right, because the stream cannot be crossed, except on the bridge, to build a fence along the creek's bank to the bridge: *Cornlison v. State*, 40 Tex. Cr. App. 159, 49 S. W. 384. Statutory authority for so doing, however, exists in some jurisdictions: *Town of Sadoris v. Black*, 65 Ill. App. 72. Said the supreme court of Illinois, in passing upon this question, under the statute of that state: "Before the present bridge was built, there was an old bridge, by the side of which was a convenient ford, much used by the public. But the present bridge occupies the site of that ford; and the new one beside, and the one claimed to be obstructed, the decided preponderance of evidence shows, is inconvenient, the banks being steep and difficult to ascend or descend, and that it was only occasionally used before the building of the fences, by persons desiring to water their teams, or wet the wheels of their wagons in the stream, for the purpose of tightening the tires; and, when the stream was dry, by persons to water their teams at a spring

on appellee's land near by. The right of way existing in the public is a right of way of passage along the highway, and not a right to get water, either in streams or springs, on the soil of the land owners. The water is no part of the highway, and its use is not an incident to the use of the highway": *Old Town v. Dooley*, 81 Ill. 255.

IV. Encroachments, Obstructions and Nuisances.

a. *Encroachments and Obstructions*.—An abutter on a public way cannot maintain an action for an obstruction to the way in that part of it which is not opposite his land, for the reason that in such a case his damage is not different in kind from that suffered by the public: *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377. See, in this connection, *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Jacksonville etc. Ry. Co. v. Thompson*, 34 Fla. 346, 16 South. 232, 26 L. R. A. 410; *Pittsburg etc. Ry. Co. v. Nottager*, 148 Ind. 101, 47 N. E. 832; *Miller v. Schenck*, 78 Iowa, 372, 42 N. W. 225; *Dyche v. Weichselbaum*, 9 Kan. App. 360, 58 Pac. 126; *Bembe v. Anne Arundel County*, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; *Currier v. Davis*, 68 N. H. 596, 41 Atl. 239; *Hill v. Hoffman* (Tenn. Ch. App.), 58 S. W. 929; *Galveston etc. Ry. Co. v. Baudat*, 21 Tex. Civ. App. 236, 51 S. W. 541; *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667; *Baier v. Schermerhorn*, 96 Wis. 372, 71 N. W. 600. The right of an abutting owner extends to having the road clear of obstructions on the ground to which he owns the fee; but it has been held that where his title extends only to the middle of the highway he cannot maintain an action for an obstruction on the opposite side of the road, the only effect of which is to render access to his property more difficult and inconvenient, and to force travel nearer his lot: *Indiana etc. Ry. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 235, 11 N. E. 467. Still, when an obstruction in a highway materially interferes with the means of access to his property, the general rule is that he may maintain an action in respect thereto, whether or not the obstruction is on the part of the road laid upon his land: *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249. Said the court in this case: "The owners of real estate abutting upon a highway have a peculiar and distinct interest in the highway in front of their real estate; this interest includes the right to have the highway kept open and free from obstructions which prevent or materially interfere with the means of ingress to and egress from said real estate."

It is a violation of the rights of the owner of the soil to store merchandise in a highway (*Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634); or to deposit fence rails therein (*Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138); or to lay gas-pipes without obtaining the consent or compensating the owner (*Kincaid v. Indianapolis Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113, 24 N. E. 1066, 8 L. R. A. 602; *Huffman v. State*, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713); or to

erect telephone or telegraph poles (*Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441, 58 L. R. A. 775; note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229; *Myers v. Bell Telephone Co.*, 82 N. Y. Supp. 83, 83 App. Div. 623); or to construct an elevated railway, though no part of the structure is in front of the owner's premises, if the inclined plane begins there: *Eldert v. Long Island Elec. Ry. Co.*, 51 N. Y. Supp. 186, 28 App. Div. 451, affirmed in 165 N. Y. 651, 59 N. E. 1122. See, also, *De Geofroy v. Merchants' Bridge Ter. Ry. Co.*, 179 Mo. 698, post, p. 524, 79 S. W. 386, 64 L. R. A. 959. The owner of land taken for a public street holds it subject to the right of appropriation of the space above and below the surface for the purpose of public travel without compensation: *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 329. And it is generally regarded that the operation of street railways does not impose an additional servitude upon the street for which the owner of the fee is entitled to compensation or an injunction against the construction of the road: *Baker v. Selma etc. Ry. Co.*, 135 Ala. 552, 92 Am. St. Rep. 42, 33 South. 685; *Doane v. Lake St. etc. Ry. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97; *San Antonio etc. Ry. Co. v. Limberger*, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 533. And the same is true as to the construction of a subway for public travel below the surface of a street: *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327. A contrary view has been taken, however, as to the appropriation of a street to the construction and operation of an ordinary commercial railroad: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; *Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856. See *Sherlock v. Kansas City Belt Ry. Co.*, 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629. The use of a public street, by putting up a fence which shuts off all access to abutting property, and occupying the street with building apparatus and a double track railway two feet above the sidewalk, is not a mere source of consequential damages, but a direct taking of the land of an abutting owner for a purpose to which it has never been dedicated or appropriated: *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 76 Conn. 311, 100 Am. St. Rep. 994, 56 Atl. 512.

Where the land is owned by an adjoining proprietor, the public cannot use a highway to erect therein a public building, such as a watchhouse: *Winchester v. Capron*, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795. But the authorities may place a reservoir or cistern in a highway for the purpose of retaining water to sprinkle the road: *West v. Bancroft*, 32 Vt. 367.

The encroachment on a highway by one abutting owner does not justify the obstruction of the road to the same extent by another owner: *Robinson v. State* (Tex. Cr. App.), 44 S. W. 509.

b. Destruction of Lateral Support.—An adjoining proprietor is, as against a wrongdoer, entitled to the lateral support of the highway for his buildings. And this right will be protected by injunction: *Finegan v. Eckerson*, 57 N. Y. Supp. 605, 26 Misc. Rep. 574. As to whether a change in the grade of a highway, made in the construction of a railway, is in violation of the rights of the abutting owner, see *Offutt v. Montgomery*, 94 Md. 115, 50 Atl. 419; *Zehren v. Milwaukee Elec. Ry. etc. Co.*, 99 Wis. 83, 67 Am. St. Rep. 844, 67 N. W. 844, 41 L. R. A. 575.

c. Nuisances—Offensive Conduct.—A person in a highway who is violent, abusive, or threatening in his language to the person over whose land the road passes, is guilty of a trespass: *Adams v. Rivers*, 11 Barb. 390; *State v. Buckner*, Phil. (N. C.) 559, 98 Am. Dec. 83. And one who stops in the road and uses loud and obscene language becomes a trespasser, and the owner of the land has a right to abate the nuisance which he is creating: *State v. Davis*, 80 N. C. 351, 30 Am. Rep. 86. So, where one, in violation of law, takes an old boat that has been left by high water in a highway, and fits it up for a grog-shop, where disorderly persons assemble and engage in unseemly conduct, to the disturbance of a person's family who lives near by, and owns the fee to the road, he may sue for the abatement of the nuisance: *Green v. Asher*, 10 Ky. Law Rep. 1006, 11 S. W. 286.

d. Deviation from Road to Avoid Obstruction.—When a public road becomes temporarily impassable by reason of obstructions or want of repair, a traveler may lawfully go upon adjoining land in order to pass around the obstruction, and continue his journey. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property is subject. But such a right, having its origin in necessity, must be limited by the necessities that create it. It does not exist from convenience merely, nor when, by the use of due care, after notice of obstructions, other ways may be used and traveling extra viam avoided. And the public acquires no permanent easement through this way, of necessity: *Campbell v. Race*, 61 Mass. (7 Cush.) 408, 54 Am. Dec. 728; *State v. Northumberland*, 44 N. H. 628; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

A traveler may, when necessary in order to extricate his team and wagon from a bog in a highway, lay down the fence by the roadside and pass through the field: *Hedgepeth v. Robertson*, 18 Tex. 858.

V. Soil and Minerals.

Not only does the soil, subject to the public easement, belong to the person across whose land a highway runs, with the same remedies for an injury to this residuary interest that he would be entitled if it was entire and absolute (*Cortelyou v. Van Brundt*, 2 Johns. 357, 3 Am. Dec. 439; *Gidney v. Earl*, 12 Wend. 98); but he is entitled to all the minerals that may be found in the highway, and he may work

the mines in such a way as not to interfere with the public use: *Trustees of Hawesville v. Hawes*, 69 Ky. (6 Bush) 232; *West Covington v. Freking*, 71 Ky. (8 Bush) 121. But in case the fee of a street has passed to the city, it can maintain an action against one who works a mine therein, and extracts the minerals: *Union Coal Co. v. La Salle*, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; *Des Moines v. Hall*, 24 Iowa, 234.

VI. Trees, Grass and Herbage.

a. **Grass and Herbage.**—The grass and herbage growing in a highway is the property of the adjoining proprietor if he owns the fee to the soil, and other people cannot lawfully cut, pasture, or destroy it: *Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532, 45 N. W. 480, 8 L. R. A. 472; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Holden v. Shuttuck*, 34 Vt. 336, 80 Am. Dec. 684; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Harrison v. Brown*, 5 Wis. 27. But see *Hardenburgh v. Lockwood*, 25 Barb. 2. Speaking of the pasturage in highways, the court uses this language in *Robinson v. Flint etc. R. R. Co.*, 79 Mich. 323, 19 Am. St. Rep. 174, 44 N. W. 779: "By the common law every person must keep animals upon his own premises. He may use the highway for the purpose of driving them from place to place. He cannot use it for a public pasture. He may pasture in the highway opposite his own premises, for he is entitled to the herbage growing there. He is not entitled to pasturage opposite the lands of others, even when the cattle are in charge of a keeper. Such a use is not an incident of travel for which the highway is dedicated or appropriated by the public."

b. **Shrubs and Trees.**—The owner of land appropriated for a highway retains his exclusive right in trees and shrubs growing on the land for every purpose not inconsistent with the easement of passage; and for their injury or destruction, when they do not constitute an obstruction or hindrance to travelers, he has a remedy: *Western Union Tel. Co. v. Krueger*, 30 Ind. App. 28, 64 N. E. 635; *Deaton v. County of Polk*, 9 Iowa, 594; *Edsall v. Howell*, 86 Hun, 424, 33 N. Y. Supp. 892; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Sanderson v. Havestick*, 8 Pa. St. 294; note to *Callanan v. Gilman*, 1 Am. St. Rep. 843. Trees in a highway may be removed by the public authorities, however, when the public necessity calls for such action: *Werner v. Flies*, 91 Iowa, 146, 59 N. W. 18; *Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 893, 51 N. W. 560, 15 L. R. A. 553. And it has been held the removal may be without notice to the owner: *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499. But this is doubtful: *Stretch v. Cassopolis*, 125 Mich. 167, 84 Am. St. Rep. 567, 84 N. W. 51; *Miller v. Detroit etc. Ry. Co.*, 125 Mich. 171, 84 Am. St. Rep. 569, 84 N. W. 49, 51 L. R. A. 955, Justice Hooker dissenting. Although the Michigan

court decides in *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928, 47 L. R. A. 497, that a telephone company may obtain a free passage for its wires by trimming trees without first giving the owner an opportunity to do the cutting. The right of a telephone company to cut or trim trees in removing their wires seems to be recognized also in *Southern Bell Telephone Co. v. Francis*, 109 Ala. 224, 55 Am. St. Rep. 930, 19 South. 1, 31 L. R. A. 193. Compare *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578, 37 N. E. 710; note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 235. And in *Miller v. Detroit etc. Ry. Co.*, 125 Mich. 171, 84 Am. St. Rep. 569, 84 N. W. 49, 51 L. R. A. 955, it is decided that a street railroad company has the right to remove shade trees within the limits of a public highway, for the construction of its road, without compensation for damages.

The malicious cutting down of trees by an overseer, which do not interfere with the public use of a highway, renders him liable in exemplary damages: *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678. And if the surveyor of highways, in making or repairing them, cuts and converts to his own use wood growing there, he is a tree-passer: *Makepeace v. Wonder*, 1 N. H. 16.

If a gas company permits its pipes in the public streets to be out of repair, so that gas escaping therefrom kills shade trees standing in the streets, the owner may recover compensation therefor: *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681, 42 N. E. 512, 30 L. R. A. 651.

The owner of land over which a highway passes has a right to plant trees by the roadside, in a manner not obstructing travel, and they cannot be lawfully injured or destroyed, either by private individuals or the public authorities, when no necessity exists therefor: *Wellman v. Dickey*, 78 Me. 29, 2 Atl. 133; *Bliss v. Ball*, 99 Mass. 597; *Graves v. Shattuck*, 85 N. H. 257, 69 Am. Dec. 536; *Commonwealth v. Hauck*, 103 Pa. St. 536; *Andrews v. Youmans*, 78 Wis. 56, 47 N. W. 304. "Ordinarily, it may be said that the entire width of the highway may be used; yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts, and do such other acts as will add to his convenience or assist in beautifying his premises. He is encouraged in doing this by public sentiment. . . . Public convenience may, in time, in particular locations, require the removal of some of these things; and whenever the necessity arises, and the public authorities request their removal, then the private must give way to the public or paramount right. But while permitted to remain, no one traveling the highway can willfully injure or destroy them; and should anyone do so, he would justly be held responsible, notwithstanding his plea of a claim of right to travel over any part of the highway": *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 233, 38 Am. Rep. 246; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532, 45 N. W. 480, 8 L. R. A. 472.

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The owner of a tree standing in a public street is bound to exercise reasonable care that it does not become dangerous to travelers, and any person specially injured through a breach of such obligation has a right of action for damages arising therefrom: *Weller v. McCormick*, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798. If the owner of a tree standing in a road a few feet from the traveled track gives his consent to its cutting down, he is guilty of obstructing the highway if the tree falls within it, and is allowed to remain there to the hindrance or inconvenience of travelers: *Note to Callanan v. Gilman*, 1 Am. St. Rep. 843.

VII. Waters and Drainage.

a. *Use of Water in Highway.*—Where a spring is located in a highway, the owner of the land is entitled to any and all uses of it which do not interfere with public travel or increase the public burden of making repairs. The authorities have a right to drain it in such a manner as to render the road safe from overflow, but they have no right to divert the water to a public watering trough on the other side of the highway: *Town of Suffield v. Hathaway*, 44 Conn. 521, 26 Am. Rep. 483. And a turnpike company has no easement in a spring within its right of way. It has a right of way for public travel only over the land upon which the waters of the spring descend, and, for the purpose of preserving its roadbed in a condition suitable for travel, it may drain the water off; but it has no right to appropriate or to take exclusive possession of the spring, or exclude the owner therefrom. He, as owner of the fee to the soil, has the title to the water and the right to make any use of it not incompatible with the enjoyment of the highway: *Upper Ten Mile Plankroad Co. v. Braden*, 172 Pa. St. 460, 51 Am. St. Rep. 759, 33 Atl. 562.

In the principal case (*ante*, p. 97), the supreme court of California holds that the owner of the soil in a highway may have the public authorities restrained by injunction from taking subterranean water from the road to sprinkle it. Yet the public authorities have a right to place in a street or highway a reservoir or cistern for the purpose of retaining water to sprinkle the road, and the owner of the land cannot maintain an action against them for so doing: *West v. Bancroft*, 32 Vt. 367.

b. *Watercourses, Streams and Raceways.*—The right of the owner of the soil in a highway to fence a stream where it crosses the road has already been considered under "Maintenance of Fences and Gates," *ante*. If a highway is laid out over watercourses, either natural or artificial, the public should not shut them up to the injury of the owner of the land, but should construct the road over them by means of bridges or culverts: *Perley v. Chandler*, 6 Mass. 453, 4 Am. Dec. 159; *Town of Groton v. Haines*, 36 N. H. 388. One

has a right to cut or sink a raceway or watercourse under a highway on his own land, but he must take care that the highway remains safe for travelers. He is bound to erect and keep in repair a proper bridge, and subsequent owners of the waterway are under the same obligation: *Town of Clay v. Hart*, 55 N. Y. Supp. 43, 25 Misc. Rep. 110; *West Bend v. Mann*, 59 Wis. 69, 17 N. W. 972.

c. **Ditches and Drainage.**—The owner of land over which a highway passes may take advantage of the road for purposes of drainage if he does not thereby interfere with the rights of the public: *Thom v. Dodge County*, 64 Neb. 845, 90 N. W. 763; *Baring v. Heyward*, 2 Spear (S. C.), 533. He may dig a ditch therein, providing he does not interfere with the use of the highway, rendering it less safe, useful, or convenient for the public: *Nelson v. Fehd*, 203 Ill. 120, 67 N. E. 828. And he may cut a ditch across the road, although if he does so he must, by bridging it or otherwise, keep the highway as good and safe for travel as before: *Dygert v. Schenck*, 23 Wend. 445, 35 Am. Dec. 575. A subsequent owner who continues the ditch is also bound to keep the bridge in repair: *Woodring v. Forks Township*, 28 Pa. St. 355, 70 Am. Dec. 134. The owner of the adjoining land may maintain trespass against another for interfering with a drain under the road: *Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358.

The public authorities may run a ditch, for the purpose of improvement, in front of an owner's premises, and the latter may bridge it, though in doing so he must not obstruct the ditch or the way: *Highway Commrs. v. Ely*, 54 Mich. 173, 19 N. W. 940.

VIII. Repair of Highways.

a. **Use of Soil, Gravel and Rock.**—When land is taken for a highway, the public acquires, as an incident to the easement, the right to use, in a reasonable manner, the soil, gravel and stone found within the limits of the way, for constructing the road and keeping it in repair: *Kreuger v. Palatine*, 20 Ill. App. 420; *Overman v. May*, 35 Iowa, 89; *Upham v. Marsh*, 128 Mass. 546; *Anderson v. Van Tassel*, 53 N. Y. 631. And within reasonable bounds the public should have the right to remove and transport material from one point to another on the highway, regardless of the ownership of the adjoining lands. The use of the material should not be confined to the particular part of the road where it is found and taken from nor even to that particular highway: *New Haven v. Sargeant*, 38 Conn. 350, 9 Am. Rep. 360; *Bundy v. Catto*, 61 Ill. App. 209; *Denniston v. Clark*, 125 Mass. 216; *Bissell v. Collins*, 28 Mich. 277, 15 Am. Rep. 217; *St. Anthony Falls Water Power Co. v. King etc. Bridge*, 23 Minn. 186, 23 Am. Rep. 682; *Huston v. Fort Atkinson*, 56 Wis. 350, 14 N. W. 444. The law on this point, however, is not clear. In at least two cases it has been decided that earth and gravel can-

not, under public authority, be dug up at one point in a highway merely to obtain material to use in the improvement of the highway at some place remote from the owner's land, when the removal of the material is not necessary to bring the road to the desired grade: *Anderson v. Bement*, 13 Ind. App. 248, 41 N. E. 547; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428. And in *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298, it is held that taking rock from a bluff within the boundaries of a right of way for use in macadamizing streets and building culverts amounts to waste, and will be enjoined. The right of a turnpike company to dig gravel or quarry rock within a highway for the repair of the road has been denied: *Turner v. Rising Sun etc. Co.*, 71 Ind. 547; *Kelly v. Donahoe*, 59 Ky. (2 Met.) 482. Of course, soil cannot lawfully be removed from one's land, within the limits of a highway, when not necessary for the construction or repair of the way: *Phillips v. Bowers*, 73 Mass. (7 Gray) 21.

b. *Use of Timber.*—It would seem clear that timber growing in a highway may, within reasonable bounds and under certain circumstances, be used in the construction and repair of the road. To quote from *Felch v. Gilman*, 22 Vt. 38: "No doubt the fee of the land remains in the land holder; and he may maintain trespass, subject to such rights, as are acquired under the easement, which the public get. The public have simply a right of way, and the powers and privileges incident to that right. We think digging the soil and using the timber and other materials, found within the limits of the highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges, are incident to the easement": See, also, *Makepeace v. Worden*, 1 N. H. 16; *Tucker v. Eldred*, 6 R. I. 404.

The foregoing language, in our opinion, should not be taken without qualification. While, no doubt, the public may be justified in many cases in making use of timber growing in a highway for road purposes, still the right to such appropriation probably depends on the circumstances and exigencies of the case, such as the abundance, character, and value of the timber, and the urgency of the public needs. Trees can hardly be classed as a road material with sand and gravel. Said the supreme court of New Hampshire in *Baker v. Shephard*, 24 N. H. 208: "We are therefore of the opinion that, by laying out a highway, the public acquire no right to use any trees or timber growing upon the land for the purpose of building and repairing the road; and that the only right they acquire in relation to such trees is that of cutting down and removing to a convenient distance, for the use of the owner, such trees as it is necessary to remove in order to the working or repair of the road in a proper and reasonable manner."

IX. Vacation or Abandonment of Highway.

Where a highway has been laid out by lawful authority or acquired by dedication or prescription, the owners of the property abutting thereon acquire a special property right in the continuance thereof, of which they cannot be deprived except by due process of law: *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332, 86 N. W. 882, 54 L. B. A. 473. See, also, *Texarkana v. Leach*, 66 Ark. 40, 74 Am. St. Rep. 68, 46 S. W. 807; *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N. E. 595; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341. But when the public easement is abandoned or relinquished, the owners of the soil are restored to their original dominion over it. The land being freed from the encumbrance, the owners may resume absolute control of it: *Benham v. Potter*, 52 Conn. 248; *Omaha Southern Ry. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557; *Lamm v. Chicago etc. Ry. Co.*, 45 Minn. 71, 47 N. W. 455, 10 L. B. A. 268; *Mangam v. Sing Sing*, 42 N. Y. Supp. 950, 11 App. Div. 212; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Harris v. Elliott*, 35 U. S. (10 Pet.) 25; note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 495. The civil-law rule, however, seems to be different: *Mitchell v. Bass*, 33 Tex. 259.

X. Remedies Available to Land Owner.

The owner of land over which a street or highway passes is entitled to protect and vindicate his rights in the soil by practically the same species of actions and remedies that would be open to him if his land was not encumbered by the way: *Bolling v. Petersburg*, 3 Rand. 563; note to *Mayhew v. Norton*, 28 Am. Dec. 303, 304. Thus, he is entitled to an injunction against a use of the road or street for other purposes than for travel which interfere with his ownership of the soil: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *Wright v. Austin* (the principal case), ante, p. 97; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. B. A. 409; *Buffalo v. Pratt*, 131 N. Y. 293, 27 Am. St. Rep. 593, 30 N. E. 233, 15 L. B. A. 413. And when the highway is encroached upon, he may maintain ejectment and recover the land subject to the public easement: *Taylor v. Armstrong*, 24 Ark. 102; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. B. A. 722; *French v. Robb*, 67 N. J. L. 260, 91 Am. St. Rep. 433, 51 Atl. 509, 57 L. B. A. 956; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73; note to *Mayhew v. Norton*, 28 Am. Dec. 304, 305. And against any person who commits a wrong in the highway, he may maintain trespass: *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Hart v. Chalker*, 5 Conn. 311; *Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 358; *Mayhew v. Norton*, 34 Mass. (17 Pick.) 357, 28 Am. Dec. 300; *Bingham v. Doane*, 9 Ohio, 165; *Lewis v. Jones*, 1 Pa. St. 336, 44 Am.

Dec. 138; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Barclay v. Howell*, 31 U. S. (6 Pet.) 498. He may abate or sue for the abatement of a nuisance: *Green v. Asher*, 10 Ky. Law Rep. 1006, 11 S. W. 286; *State v. Davis*, 80 N. C. 351, 30 Am. Rep. 86. For a conversion of his timber, he may maintain trover: *Sanderson v. Haverstick*, 8 Pa. St. 294.

BANK OF UKIAH v. RICE

[143 Cal. 265, 76 Pac. 1020.]

WILLS—Equitable Conversion.—If a testator devises land to his wife for life, in trust for their children, and directs the executor, after her death, to sell the property and divide the proceeds among the children, the effect of this direction is to convert the land into personality. (p. 120.)

WILLS—Partition by Heirs.—Where a testator devises land to his wife for life, in trust for their children and directs the executor, after her death, to sell the property and divide the proceeds among the children, their title is insufficient to maintain partition as heirs at law of the testator. (p. 121.)

WILLS—Election to Take Land Instead of Its Proceeds.—Where a testator directs land to be sold and the proceeds distributed among designated beneficiaries, they may elect, before the sale is made, to take the land instead of its proceeds. The estate is thereby reconverted into realty, and their relation to it is the same as if it had been directly devised to them. But until they make the election for a reconversion, and manifest the same to the executor, they are not entitled to the possession of the land, or to exercise any dominion over it. (pp. 121, 122.)

WILLS—Insufficient Election to Take Land Instead of Its Proceeds.—Where a testator devises land to his wife for life, in trust for their children, and directs the executor, after her death, to sell the property and divide the proceeds among the children, and one of the children gives a mortgage on his undivided interest, which is followed by the execution of a sheriff's deed under a judgment of foreclosure, such election to take the land instead of its proceeds, on his part only, is insufficient to work a reconversion of the property into realty; so, too, is the bringing of an action for partition by the purchaser under the mortgage, when it is not alleged that the beneficiaries have made an election, and some of them are minors. (pp. 123, 124.)

Bond & Haycock, McNab & Hirsch, M. S. Sayre and Sayre & Keeling, for the appellants.

Crawford & Crawford, for the respondents.

238 HARRISON, C. Action for the partition of certain real estate.

269 The land of which partition is sought was owned by Charles Coleman Rice in his lifetime and at the time of his death. He died January 11, 1891, leaving a last will and testament in which he appointed his wife, Jane Rice, and his son, Benjamin F. Rice, executors thereof, and, after disposing of certain portions of his estate, made the following disposition of the land in question, viz.:

"I give and bequeath to my wife, Jane Rice, all the balance of my ranch saving and excepting any part thereof which I have heretofore disposed of, to be held by her during the term of her natural life in trust by her for the benefit of Jeremiah Farmer Rice, William Isaac Rice, Sam H. Rice, and Lillian Belle Pulliam. After the decease of my wife, Jane Rice, I hereby direct my executors to sell all the balance of my ranch and the proceeds thereof to be equally divided share and share alike between my sons Jeremiah Farmer Rice, William Isaac Rice, Sam H. Rice, and Lillian Belle Pulliam."

The will was admitted to probate and letters testamentary issued to the executors therein named, and thereafter they filed a report of their administration, and an account for a final settlement, together with a petition for a final distribution of the estate; and on May 31, 1892, the court made an order settling and allowing the account and distributing the land aforesaid to the surviving widow, "for and during her natural life, and on her death the same to be sold as in said will provided, and the proceeds arising from such sale to be equally divided between Jeremiah Farmer Rice, William Isaac Rice, Sam H. Rice, and Mrs. Lillian Belle Pulliam." June 1, 1891, Sam H. Rice, one of the sons of the testator, executed a conveyance, intended as a mortgage, to the plaintiff herein, of all of his interest in said land. In May, 1895, the plaintiff commenced an action for the foreclosure of this mortgage and obtained a judgment under which the interest of the mortgagor in the land was sold to it, and a deed therefor executed April 15, 1898. Jeremiah F. Rice, another son of the testator, died intestate March 31, 1898, leaving as his heirs at law a widow and two sons. One of these sons died intestate November 13, 1900, leaving as his heirs at law a widow and three minor children. Jane Rice, the widow of the testator, died January 6, 1901. The present action was brought November 29, 1901, in which the plaintiff included 270 as defendants the surviving children of the testator and the heirs at law of the above-named J. F. Rice and of his deceased son. The cause

was tried by the court, and upon the foregoing facts the court found that the plaintiff and defendants are not cotenants in the tract of land described in the complaint, and rendered judgment denying the prayer of plaintiff's complaint and dismissing the action. A motion for a new trial was denied, and from this order and from the judgment the present appeal has been taken.

The appellants maintain their right to a partition of the land upon the ground that at the death of C. C. Rice it descended to his heirs at law, of whom they are successors in interest, and upon the further ground that the administration of the estate has been completed, and as the parties herein are the sole beneficiaries in the land they have the right to elect to take the land itself instead of the proceeds arising from the sale.

1. The testator made no devise of the land after the termination of the life estate, but his direction to the executor to sell the same and divide the proceeds equally between the four children therein named vested them with the entire interest therein by reason of their being the sole beneficiaries thereof. The effect of this direction in the will was to convert the land into personalty (Civ. Code, sec. 1338); and the beneficiaries may therefore be deemed legatees rather than devisees. The provision in this section that the proceeds of the sale must be deemed personal property "from the time of the testator's death" is applicable only when the will merely directs the sale to be made without limiting or designating the time at which it is to be made. If the will postpones the time of the sale until the happening of some future event or until some fixed date, the conversion is likewise postponed. There can be no conversion until the executor shall have the power to make the sale. This was clearly expressed in *Estate of Walkerly*, 108 Cal. 652, 41 Pac. 777, 49 Am. St. Rep. 97, and note, as follows: "The rule of equitable conversion merely amounts to this, that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes and in aid of justice consider the conversion as effected at the time when the sale ought to ²⁷¹ take place, whether the land be then really sold or not. But whenever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate."

While it may be conceded that upon the death of C. C. Rice his title to the land descended to his heirs at law, their right thereto was subject to the administration of his estate, and

subordinate to his testamentary disposition thereof. Their right to the land as heirs at law was superseded by the provisions of the will and the decree of the court directing its sale and a distribution of the proceeds. The decree of distribution was a judicial declaration that the beneficiaries therein named were the absolute donees of the entire property in the land after the termination of the life estate. By this decree the property was taken out of the line of descent and adjudged to belong to the four children therein named. The fact that the beneficiaries thus named are also heirs at law is only a mere incident, but does not vary the legal result. Their right to the property as heirs at law was terminated by the decree, and whatever right they have in the land is taken by virtue of the will and not by descent. The land is not devised to them, and even if it should be conceded that until a sale is had by the executor as directed by the decree the legal title will remain in them as the heirs at law of the testator (see, however, section 863 of the Civil Code), it is merely a formal and barren title without any estate or interest in the land, or right to its possession, and is therefore insufficient to sustain an action for partition by them as heirs at law of the testator: *Armstrong v. McKelvey*, 39 Hun, 213, 104 N. Y. 179, 10 N. E. 266; *Purdy v. Wright*, 44 Hun, 239; *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814.

2. The appellants' right to maintain the action by reason of their relation to the land as the beneficiaries under the sale directed by the decree is to be determined upon a consideration of different principles. It is a well-settled rule in equity that where a testator directs land to be sold and the proceeds thereof to be distributed among certain designated beneficiaries, such beneficiaries may elect before the sale has taken place to take the land instead of its proceeds, and when they have so elected and sufficiently manifested their election, the authority to sell the land cannot thereafter be exercised by the executor, but is extinguished. The estate is ²⁷² thereby reconverted into real property, and by reason of such reconversion the relation of the beneficiaries to the land is the same as if it had been directly devised to them: *Pearson v. Lane*, 17 Ves. 101; *Craig v. Leslie*, 3 Wheat, 563, 4 L. ed. 460; *Hetzel v. Barber*, 69 N. Y. 1; *Prentice v. Janssen*, 79 N. Y. 478; *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec.

600; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495; *Swann v. Garrett*, 71 Ga. 566; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; *Pomeroy's Equity Jurisprudence*, sec. 1175; *Chaplin on Express Trusts and Powers*, sec. 691. This right rests upon the presumption that the power of sale given to the executor was intended for the benefit of the beneficiaries, and upon the principle that as they are the absolute owners of the entire property in the land, they have the right to direct the disposition to be made of it; and also in consideration of the practical effect of a contrary rule. If they are entitled to the entire proceeds of the sale, they could outbid any other purchaser, and thus indirectly accomplish their desire to retain the land.

Until the beneficiaries, however, make the election for a reconversion of the estate and manifest such election to the executor, they are not entitled to the possession of the land, or to exercise any dominion over it. As executor of the will, he is entitled to its possession until the estate is settled or delivered over to the heirs or devisees "by order of the court": Code Civ. Proc., sec. 1452. The land in question was not devised to the executor, nor was any trust therein created in him other than such as pertains to his office as executor. The expression "in trust" in the devise of the life estate to the widow is without significance or legal effect, as no purpose of said trust was named. The testator directed the executor, as one of the functions pertaining to his office, to sell the property and divide the proceeds between the four beneficiaries. Until this is done the administration of the estate will not be closed. The provision in the decree of distribution of the life estate to Mrs. Rice, that on her death the land is to be sold "as in said will provided," is a designation of the executor as the person by whom the sale is to be made, and postpones the closing of the administration ²⁷³ until after such sale and the distribution of the proceeds. The sale is to be made by him as executor, and will not be effective to pass the title without its confirmation by the court (*Estate of Durham*, 49 Cal. 490), and he will not be entitled to his discharge until he has accounted for the proper distribution of the proceeds. It was not necessary to obtain from the court an order to sell the property, but the making of such order or his application therefor is irrelevant to the plaintiff's right to maintain the present action.

As the reconversion depends upon an election therefor by the beneficiaries, such election is an affirmative element in the

establishment of their right to the land, and must be manifested by some unequivocal act or declaration (*Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925); and a plaintiff whose right of action rests upon a reconversion resulting from such election must not only show this fact by his complaint, but also establish it by proof: *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471. The act or declaration evidencing the intention to make the election may be slight, but it must be unequivocal: *Jarman on Wills*, *563; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471. A conveyance of the land by the beneficiaries is evidence of such election (*Gest v. Flock*, 2 N. J. Eq. 108), since they thereby part with their right to the proceeds of the sale, as well as their right to the land, and cease to have any interest in the execution of the power: *Sayles v. Best*, 140 N. Y. 368, 35 N. E. 636. If, however, the reconversion is to be effected by a conveyance, such conveyance must be made by all of the beneficiaries, unless the estate is of that character that a conveyance by one or more of them will not impair the interest of the others: *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; *McDonald v. O'Hara*, 114 N. Y. 566, 39 N. E. 642; *High v. Worley*, 33 Ala. 191; *Harcum v. Hudnall*, 14 Gratt. 369; *Jarman on Wills*, *564; *Chaplin on Express Trusts and Powers*, sec. 696. In *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, the reason for this rule is clearly stated to be that, "as each has a separate right to insist upon the bequest as provided by the will, their claim cannot be defeated except upon the election of all; hence each must have the uncontrolled right to have the land sold, and to receive his share of the proceeds of the sale of the land." A conveyance by one beneficiary of his undivided interest in ²⁷⁴ the land will not operate as a reconversion of that interest, since it needs no argument to show that the value of a tract of land is impaired if the land can be sold only in fractional interests.

As a necessary sequence of the foregoing rule, if any of the beneficiaries are incapable of making an election—that is, if they are infants, or lunatics, or incompetent, or otherwise disqualified from making contracts with reference to their property—there can be no reconversion of the estate: *Seeley v. Jago*, 1 P. Wms. 389; *Fluke v. Executors*, 16 N. J. Eq. 478; *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

The mortgage to the plaintiff by S. H. Rice of his undivided interest in the land, followed by the subsequent execu-

tion of the sheriff's deed under a judgment foreclosing the mortgage, was an act of such a positive and unequivocal character as to indicate his election for a reconveyance, and had the effect to vest in the plaintiff his interest in the land, as well as in the proceeds from the sale, in case the power of sale should be subsequently executed: *Reed v. Underhill*, 12 Barb. 113; *Sayles v. Best*, 140 N. Y. 376, 35 S. E. 636; *Harper v. Chatham Nat. Bank*, 17 Misc. Rep. 221, 40 N. Y. Supp. 1084; *Gest v. Flock*, 2 N. J. Eq. 108. Such election on his part only was, however, as is hereinbefore shown, insufficient to effect a reconversion.

The commencement of the present action by the plaintiff for a partition of the land was also a positive and unequivocal act, indicating its election to take the land, and if all of the parties interested had been capable of making such election, and had united in the prayer for partition, a reconversion would have been thereby effected: *McDonald v. O'Hara*, 144 N. Y. 566, 39 N. E. 642; *Chaplin on Express Trusts and Powers*, sec. 557. The complaint herein does not, however, allege that the beneficiaries have so elected, nor does it contain any fact indicating a reconversion of the estate, or from which such reconversion can be inferred, and it appears from the record that, of the defendants, two of the beneficiaries who are appellants did not appear or in any mode indicate their desires, but made default to the complaint, and that three of the defendants are minors, and therefore incapable of making an election.

The finding of the court that the plaintiff and the defendants ²⁷⁵ are not cotenants of the land described in the complaint is therefore sustained by the evidence, and its action in dismissing the complaint was without error.

Certain rulings of the court upon matters of practice and procedure were excepted to by the appellant, but as these rulings in no wise conduced to the establishment of the above fact, they are without moment and need not receive any consideration.

We advise that the judgment and order appealed from be affirmed.

Chipman, C., and Cooper, C., concurred.

For the foregoing reasons the judgment and order appealed from are affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

A Will Produces an Equitable Conversion of real estate into personality when it devises land to the executors, and gives them a power of sale for the purpose of disposing of the proceeds among designated beneficiaries: *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367. See, also, *In re Cooper's Estate*, 206 Pa. St. 628, 56 Atl. 67, 98 Am. St. Rep. 799, and cases cited in the cross-reference note thereto; monographic note to *Ford v. Ford*, 5 Am. St. Rep. 141-148.

Persons Benefited by the Equitable Conversion of real estate into personality by a will may elect to have a reconversion into realty, and take it as land rather than the proceeds of it: *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367; although where there are more persons than one entitled to have such election, all of them must ordinarily join therein: See the monographic note to *Ford v. Ford*, 5 Am. St. Rep. 147.

144 Cal. 121.

McHATTON v. RHODES.

[148 Cal. 275, 76 Pac. 1036.]

JUDGMENT Against Nonresident—Jurisdiction—The Presumption of verity attending the decision of a court of general jurisdiction on the question of its jurisdiction applies to a judgment of a sister state obtained against nonresidents by publication, although the order for publication does not appear in the record. (p. 129.)

JUDGMENT-ROLL—The Order for Publication of Summons is no part of the judgment-roll. (p. 130.)

JUDGMENT — Presumption as to Publication of Summons.—If a judgment of a sister state recites that the defendants were duly notified by publication more than thirty days before the first day of the term of court, it must be presumed that an order was made for the publication, and that notice was given as the law of that state provides. (p. 130.)

Byron Waters and Waters & Wylie, for the appellant.

John W. Kemp, for the respondent.

²⁷⁶ COOPER, C. Appeal from judgment in favor of plaintiff. The record consists of the judgment-roll and a bill of exceptions.

It appears by the complaint that a contract was made between the plaintiff and defendant, by which plaintiff transferred to defendant certain personal property in exchange for a tract of land in the state of Missouri, which defendant Rhodes claimed to own at the time of the exchange.

Plaintiff alleges that after the exchange he discovered that defendant had no title to the land described in the deed; that

the representation that defendant had such title was false and fraudulent; and that plaintiff has rescinded the contract.

The issue was thus made as to whether or not the defendant had title to the land at the time he attempted to convey it. It appeared that one Hattie Meagher was the immediate grantor of defendant. In order to prove that defendant had no title the plaintiff offered, and the court admitted in evidence, a certified copy of the judgment of the eighteenth judicial circuit of the state of Missouri, in a case where A. M. ²⁷⁷ Brown was plaintiff and Hattie Meagher et al. defendants, which judgment directed, among other things, that a deed executed by Henry Diebels and Jennie Diebels to Hattie Meagher be set aside, and further adjudged the plaintiff in said action to be the owner in fee simple of the said real estate, the same being the real estate described in the complaint herein. The certified copy of the judgment was admitted in evidence, under defendant's objection, for the purpose of proving that defendant had no title to the land. Upon this evidence the court found that the defendant did not own the land at the time he conveyed to plaintiff, and gave judgment for seven hundred and fifty dollars and costs. The objection to the judgment being admitted in evidence was upon the ground, among others, that it did not appear therefrom that the court had jurisdiction of the persons of Hattie Meagher and J. H. Meagher, her husband, who are conceded to have been nonresidents of the state of Missouri, because they were not personally served with process of any kind in the state of Missouri or elsewhere, and because it does not appear that the court or the judge thereof in the said action ever made any order requiring summons or other process to be served by publication, or that any order of publication in said action was ever made at all.

The recital in the judgment as to service upon the said Hattie Meagher and her husband is as follows: "The above-named defendants have been duly notified of the institution of this suit by publication in four consecutive issues of the "Marshfield Mail," a weekly newspaper printed and published in Webster county, Missouri, the last insertion being more than thirty days before the first day of this term of court." It is conceded that the court rendering the judgment was a court of general jurisdiction. Plaintiff introduced in evidence section 2022 of the Revised Statutes of the state of Missouri, which provides that if it is alleged in the petition or in an affidavit that defendants, or some of them, are nonresidents of the state, and cannot be

served in the state, the court in which the suit is brought, or in vacation the clerk thereof, "shall make an order directed to the nonresidents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property ²⁷⁸ sought to be partitioned, requiring such defendant or defendants to appear on a day to be mentioned therein and answer the petition, or that the petition will be taken as confessed. If in any case there shall not be sufficient time to make publication to the first term, the order shall be made returnable to the next term thereafter that will allow sufficient time for such publication."

The court being of general jurisdiction, all presumptions are that it had jurisdiction, and that the effect of the recital in the judgment is, that the notice or summons was properly published. It is declared in the constitution of the United States that full faith and credit shall be given in each state to the judicial proceedings of every other state.

It is provided in subdivision 16 of section 1963 of the Code of Civil Procedure that, among disputable presumptions, it is presumed "that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction." The jurisdiction of the courts of general jurisdiction as to persons extends in a general sense to persons within their territorial limits, and who can be reached by their process. In a certain class of proceedings in rem, where the property or subject of the action is within the territorial limits of a state, it may, by statutory provisions, procure jurisdiction of the person of a nonresident by constructive service of its process. The question as to the presumption of jurisdiction as to a domestic judgment is very fully considered in *Re Eichhoff*, 101 Cal. 602, 36 Pac. 1, and it is there said: "The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject matter of the action, and of the defendant against whom the complaint was directed. Its jurisdiction does not exist by virtue of its mere decision that it has jurisdiction, as that would be reasoning in a circle, but the presumption of its jurisdiction exists because it has been authorized to determine this question in the same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it. Its determination upon

this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support its conclusion ²⁷⁹ thereon, it has the jurisdiction to make the determination; and if its conclusion is incorrect, it is merely error, which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision."

We think the rule above stated applies equally to a judgment obtained against a nonresident by publication. The court has jurisdiction in such case, provided certain things are done. Notice must be given as provided by the statutes of the state. The court must determine before giving judgment that such things have been done. The presumption in support of a judgment of a court of general jurisdiction is not made to depend upon the way in which a summons is required to be served. The rights of nonresidents are no greater than the rights of residents, when such nonresidents are brought before the court by proper process. The way of bringing them into court may be different, but in all cases where a judgment is collaterally attacked we must presume, in the absence of anything appearing to the contrary, that they were properly brought in. The presumption is the same where service has been made by publication as where personal service has been had. It is necessary that confidence should be reposed in courts of such high character. It is the only safe rule for the protection of persons and property. If such judgments are erroneous, or if they were in fact rendered without jurisdiction, they may be reversed on appeal, by new trial, or in some cases by proceedings in a court of equity, but when not questioned in some direct proceeding the good of society demands that they shall not be collaterally attacked unless void on their face. Such is the rule stated in most of the late cases: *Iiams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411; *Buse v. Bartlett*, 1 Tex. Civ. App. 335, 21 S. W. 52; *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295; *Thomas v. King*, 95 Tenn. 66, 31 S. W. 983; *Gimmell v. Rice*, 13 Minn. 400; *Hoagland v. Hoagland*, 19 Utah, 103, 57 Pac. 20; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; 1 Black on Judgments, sec. 281, and cases cited.

²⁸⁰ Appellant contends that the rule is declared in *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959, to be, that no presumption shall be indulged in favor of a judgment against a nonresident by publication. There are expressions in the opinion very much tending in that direction. But whatever may have been said in *Galpin v. Page* must yield to the later and better rule laid down in *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742, 29 L. ed. 892, where it is said: "Where a court of general jurisdiction is authorized in a proceeding either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid."

It is said in *Black on Judgments* (vol. 1, sec. 281), in commenting upon some of the earlier cases, including *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959: "but on the other hand, most of the later decisions contend, and with much show of reason, that such a rule is arbitrary and illogical, for, say they, the court is none the less a court of general jurisdiction because in this instance the legislature prescribes a special mode for the exercise of its powers. . . . According to this view, in cases of constructive service, the record, if silent or incomplete, should be aided by the same presumptions which obtain in the case of ordinary judgments founded upon personal service." And, after referring to the later decisions, it is said in *Freeman on Judgments* (vol. 1, sec. 127): "The position is taken that presumptions of regularity are applicable to the proceedings of courts of record, not because of the particular means which these tribunals happen to employ, under the authority of the law, for the purpose of acquiring jurisdiction of the defendant, but because of the high character of the courts themselves, and this character is essentially the same in all cases irrespective of the methods employed in the service of process."

In this case the order for publication does not appear in the record, and hence appellant claims that the rule stated ²⁸¹ in *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255, 6 Sup.

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Ct. Rep. 742, 29 L. ed. 892, does not apply. It is sufficient to say that the order is no part of the judgment-roll, and cannot be considered: *In re Newman*, 75 Cal. 220, 7 Am. St. Rep. 146, 16 Pac. 887; *Sichler v. Look*, 93 Cal. 603, 29 Pac. 220. In the latter case it was held on direct appeal that where a summons was served by publication, "in support of the judgment of the court, it will be presumed upon a direct appeal, in the absence of any evidence to the contrary, that this mode of service was made under a proper order of the court therefor, and that a sufficient affidavit for such order was presented to the court before making the order." In the case at bar the recital in the judgment is, that the defendants have been duly notified by publication more than thirty days before the first day of the term of court. We must presume that an order was made for the publication of the notice, and that the notice was given as the laws of Missouri provide. The record does not show that the court did not have jurisdiction.

It is claimed by appellant that the judgment should have been that the property be restored to the plaintiff, and not for the value of the property. The complaint, which is verified, alleges that the property has been sold by defendants and the proceeds thereof converted to their own use. The answer does not deny this. Therefore, it was not necessary to find upon the question, and it would have been useless to make a judgment in the alternative. We find no error in the record.

It is advised that the judgment be affirmed.

Chipman, C., and Harrison, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Henshaw, J., Lorigan, J.

When a Judgment of a court of general jurisdiction is attacked collaterally, the presumption is that jurisdiction over the defendant was obtained: Burke v. Interstate Sav. etc. Assn., 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; Haupt v. Simington, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352, 80 S. W. 783. But see Mullins v. Rieger, 169 Mo. 521, 92 Am. St. Rep. 651, 70 S. W. 4. And if a judgment recites that service of summons was duly made, it must be presumed that that fact appeared to the court by competent proof: Kalb v. German Sav. etc. Soc., 25 Wash. 349, 87 Am. St. Rep. 757, 65 Pac. 559.

Judgments Rendered upon Constructive Service by publication are given the same conclusive effect and are entitled to the same favorable presumptions as are judgments upon personal service: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778. See,

further, *Boyle v. Musser-Sauntry etc. Mfg. Co.*, 88 Minn. 456, 97 Am. St. Rep. 538, 93 N. W. 520; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; *Hunter v. Buff*, 47 S. C. 525, 58 Am. St. Rep. 907, 25 S. E. 65.

AIGELTINGER v. EINSTEIN.

[143 Cal. 609, 77 Pac. 669.]

FRAUDULENT CONVEYANCE—Bill to Set Aside Before Judgment.—A creditor who attaches real estate as the property of his debtor, after an alleged fraudulent conveyance thereof, cannot, before reducing his claim to judgment, maintain a creditor's bill to set aside the conveyance. (p. 136.)

Waldemar J. Tuska, for the appellant.

Myer Jacobs and Arthur J. Dannebaum, for the respondents.

¶10 **CHIPMAN, C.** Creditor's bill. Defendants had judgment on demurrer, to the sufficiency of the complaint from which plaintiff appeals. The complaint alleges that defendants are husband and wife; that in March, 1899, Jacob conveyed to his wife, Delphine, without any consideration paid therefor, the land in question for the purpose of avoiding the then existing claims of his creditors, among them the plaintiff, of which purpose his wife had full knowledge when she took the deed; that the money loaned by plaintiff to Jacob was used by the latter, and also was used for the benefit of a certain partnership of which Jacob was a member, and of which, at the commencement of the suit, he was the sole surviving member; that said copartnership was indebted in a large sum to divers creditors, and was unable to pay its liabilities, and was insolvent; that Jacob had no property that was exempt from execution other than the land in question. Subsequently, January 30, 1900, plaintiff brought his action in the superior court against defendant Jacob, and regularly sued out a writ of attachment, which was, on February 2, 1900, duly levied on the said land as the property of Jacob, but as ¶11 standing in the name of said defendant Delphine, and said levy is now in full force and effect.

Plaintiff's prayer is, that the conveyance referred to be declared void; that it be adjudged that he has a good and

substantial lien upon the real property described in the complaint; and that he have such further relief as is proper in the premises.

The only ground on which defendants claim that the demurrer was rightly sustained is, that on the case made in the complaint judgment was a necessary prerequisite to the action to set aside the alleged fraudulent transfer. No other question is presented by the briefs.

Mr. Pomeroy says: "It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law. The general rule is, therefore, that a judgment must be obtained, and certain steps taken toward enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he had obtained his judgment": 3 Pomeroy's Equity Jurisprudence, sec. 1415.

The courts, however, all agree and have held that there are exceptions to the general rule stated above. Whether the case of an attaching creditor who has by his writ secured a lien on the property, but as yet has no judgment, comes within the exception is a question about which the decisions are not harmonious. Our statute reads as follows: "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation."

Appellant claims that it has been decided by this court that an attaching creditor could before judgment have his bill in equity to set aside the fraudulent conveyance of the attached property without waiting judgment: Citing *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Scales v. Scott*, 13 Cal. 76; *Conroy v. Woods*, 13 Cal. 633, 73 Am. Dec. 605; *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Castle v. Bader*, 23 Cal. 76. It becomes necessary to examine ⁶¹² these decisions of this court. In *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519, the action was by an attaching creditor to enjoin the sheriff from selling property on execution under a judgment alleged to have been fraudulently obtained by *Dannenberg* against the debtor (*Morris*) a few days before the filing of the bill. Plaintiff's attachment was subsequent to the execution.

All the facts alleged in the bill, except the fraud, were admitted in the answer.

The court, after stating the general rule to be as we have shown, said: "The modern decisions of some courts of the United States seem, however, to have relaxed the severity of the English rule, and in some cases it has been held that a creditor who has acquired a lien under the attachment laws of a state may apply to a court of chancery without first proceeding to judgment. Without expressing any preference for the modern doctrine, we are satisfied that the facts and circumstances of this case take it out of the ancient rule." The reason given was that unless the sale could be stayed "the property which they [plaintiffs] have attached in the meantime would have passed into the hands of bona fide purchasers under color of a judicial sale, and be lost to them forever." The court further said that the jurisdiction could not be refused in a case like the present, where the sole issue was one of fraud, and where by such refusal the fraud complained of would be most successfully consummated. *Scales v. Scott*, 13 Cal. 76, was a similar case, and *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519, was followed. In both cases personal property was attached as we infer. In *Conroy v. Woods*, 13 Cal. 633, 73 Am. Dec. 605, the court said: "The authorities do not place the right to go into equity upon the ground that plaintiffs must show themselves to be creditors by judgment; but they go on the ground that they must show a lien on the property; and this lien exists as well by the levy of an attachment as by execution." These observations must be read in the light of the facts disclosed, and they show that the court did not question the general rule, but found sufficient circumstances not unlike those in the cases last above noted, to bring the case within the exceptions to the rule. *Conroy v. Woods*, 13 Cal. 633, 73 Am. Dec. 605, does not support the doctrine on which appellant relies. Besides, it appears that the plaintiff and interveners in that action had ⁶¹³ not only attachment liens, but also had judgments. The point decided in *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204, was, that where the property is in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the officer must produce not only the writ but the judgment which authorizes its issuance. And the

court then states the rule as we have given it *supra*, adding, "or has some process regularly issued, as in the case of an attachment authorizing a seizure of the property": Citing *Thornburgh v. Hand*, 7 Cal. 554. In the latter case the vendee of certain personal property of the debtor brought replevin against the sheriff, who sought to justify under a writ of attachment by which he had seized the property. The question involved was whether the officer could justify by simply producing the writ and proving the existence of the debt, or whether he must not also show all the proceedings on which the writ was based, and the court held that he must show the regularity of all the proceedings which were the basis of the writ. As this was not shown, the justification failed. It is, however, fairly inferable from the opinion that it would have been held sufficient had the sheriff shown the proceedings to be regular and that the writ was properly issued. Without affirming or denying this view of the question, where an officer seeks to justify his seizure and possession of property, we do not think the doctrine supported by reason or the weight of authority when applied to a creditor at large who attacks the transfer, armed alone with a writ of attachment duly served and an alleged indebtedness not yet brought to judgment, and in the absence of any circumstances showing a necessity for equitable interposition, in order to preserve the property from transfer to innocent third persons. In the concluding paragraph of the opinion in *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204, the court said: "Unless the transfer were made to hinder, delay or defraud creditors, the sheriff could not question its validity, and not even then without first producing the judgment under which the execution he held was issued." The remaining case relied on by appellant—*Castle v. Bader*, 23 Cal. 76—was decided on the ground that the facts constituting the fraud were not sufficiently alleged or found. It was also ⁶¹⁴ said by the court that the complaint was insufficient in that it does not aver that plaintiffs have acquired any lien on the property they seek to have applied in satisfaction of their debts, or that they have obtained judgment on their debts on which execution has been issued, and return no property found. Upon a careful examination of these early cases, we do not find that they necessarily involved or decided the question we now have before us. In *McMinn v. Whelan*, 27 Cal. 300, the defendants sought, among other defenses, to attack the convey-

ance in question. They had a judgment, which, however, was held by the court to be void, and they then claimed the right to attack the conveyance by reason of an attachment levied on the property. The court said: "If the defendant O'Connor had a lien on the premises by reason of the attachment, that lien could not be rendered effectual for the purpose of impeaching the conveyance to the plaintiff until judgment be obtained in the suit of Gleason v. Maume, and it is possible that no such judgment will ever be obtained. If the defendant O'Connor, as the assignee of Gleason, was, at the commencement of this action, and when it was tried, the creditor of Matthew Maume, he was simply a creditor at large without a judgment, and hence not in a position to maintain an action by answer in the nature of a cross-bill in equity to set aside the conveyance made to plaintiff." The case of *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765, furnishes an exception to the general rule, and on the peculiar facts alleged and shown, a fraudulent conveyance was set aside without judgment first obtained against the fraudulent vendor—debtor. In *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485, the debtor had commenced proceedings in insolvency, which prevented plaintiffs from obtaining judgments against him. The action to set aside the alleged fraudulent conveyance to his wife, brought on behalf of all the creditors, and asking that when the assignee in insolvency should be appointed that he be made a party, was sustained. *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, was also by its peculiar facts taken out of the operation of the general rule.

Section 1589 of the Code of Civil Procedure gives an executor or administrator authority to bring an action to set aside the fraudulent conveyance of his testate or intestate for the benefit of creditors, "when there is a deficiency of assets in the hands of the executor or administrator." It has been held under this section that it must appear: 1. That there are creditors to be paid; 2. That there is an insufficiency of assets in the hands of the administrator to meet their demands; and 3. The claims of the creditors must be evidenced by a judgment obtained in this state, or they must have been allowed by the administrator or executor, which is the equivalent of a judgment: *Forde v. Exempt Fire Co.*, 50 Cal. 299; *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244; *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323. It may be

said that these cases do not reach the precise point now before us. But if general creditors of an estate, as well as the administrator, may not bring their action against the fraudulent vendee of the deceased debtor without first having their claims allowed, the principle involved would seem to have some application. The question will be found discussed and the authorities on both sides collated in Wait on Fraudulent Conveyances, sec. 81; Bump on Fraudulent Conveyances, sec. 538, Pomeroy's Equity Jurisprudence, sec. 2185, and 5 Encyclopedia of Pleading and Practice, p. 525. Among the decisions supporting the view taken by the lower court, we find the reasoning of Mr. Justice Brewer in *Tennent v. Battey*, 18 Kan. 324, entirely satisfactory. Briefly summarized, the reasons given were: Though the attachment is a specific lien, it is a lien of very uncertain tenure. It may be defeated by dissolution on motion, or by a judgment in favor of defendants on the merits of the claim. Suits by attachment are common, and the writ issues without any order of the court and on the affidavit of the creditor alone, alleging any one of the statutory grounds. No advantage would inure to the creditor, except in the mere matter of time, by sustaining the equitable action. The seizure of the officer preserves the lien as against all changes and transfers, and everything the debtor or his assignee could do subsequent thereto. Except as to perishable property and property whose keeping is expensive, no sale can be ordered until after judgment, and for such property there would be no advantage to sustain an action like this. It might happen that the attention of the court would be occupied in useless litigation because the attachment might be dissolved before judgment, which would end the lien and also the action to set aside the conveyance. The claim of the creditor should be certain before he can concern himself with the debtor's frauds, and it cannot be made certain except by judgment. A claim that is merely asserted ought not to be sufficient. It may be conceded that an officer has the right to defend his possession of the attached property, and often the defendant's acts may be inquired into; but it does not seem to follow that because an officer may do this, the plaintiff may prosecute an independent action, not to preserve the possession, but to clear up the title. When the claim has become certain he may inquire into the title. Possession may be preserved to preserve

the attachment lien, but nothing more is necessary until the claim is made certain.

It seems to us that there is no satisfactory answer to this view of the question. It does not appear from the complaint that there is any danger of plaintiff's lien being lost. Plaintiff has no right under his attachment beyond that of using such measures as may be necessary to preserve his security until he can reduce his claim to judgment; the attachment is but a provisional remedy that can avail nothing beyond fixing a lien on the property pending the inquiry into the merits of the claim. We do not think the plaintiff should have the right to harass third parties with litigation that may prove fruitless, in efforts to remove obstructions to the sale of the property, until he has first established his right to have a sale. There is no hardship in enforcing such a rule, while great hardship and needless annoyance might ensue upon the adoption of the rule for which plaintiff contends.

Turning to our statute, *supra*, can it be said in the present case, that the alleged fraud "obstructs the enforcement by legal process of his [the creditor's] right to take the property affected by the transfer"? Plaintiff has his lien on the land secured against the whole world, and he is entitled to no other legal process until he has his judgment. When he has judgment, he then has his execution, but as the transfer would obstruct the sale under the execution or "legal process," he may then have the obstruction removed, should there be no other property of the debtor sufficient to meet the demand, which latter fact may appear by return of the execution, *nulla bona*, or may appear by the admission of the allegation in the complaint that the debtor has no property ^{or} subject to execution except the property in question, or that he is insolvent.

It is advised that the judgment be affirmed.

Harrison, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

McFarland, J., Lorigan, J., Henshaw, J.

A *Creditor's Bill* cannot, as a general rule, be maintained before the claim is reduced to judgment: See the monographic note to Ladd v. Judson, 66 Am. St. Rep. 276, on what claims will support a creditor's bill. Consult, also, the subsequent cases of Spooner v. Trav-

elers' Ins. Co., 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305; Adou v. Spencer, 62 N. J. Eq. 782, 90 Am. St. Rep. 484, 49 Atl. 10, 56 L. R. A. 817; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Hutchinson v. Maxwell, 100 Va. 169, 98 Am. St. Rep. 944, 40 S. E. 655, 57 L. R. A. 384.

IN RE REED.

[148 Cal. 634, 77 Pac. 660.]

CRIMINAL LAW—Inadequate Sentence—Habeas Corpus.—A judgment of imprisonment for a term less than that prescribed by statute for the offense committed is not void, and the prisoner will not be discharged on habeas corpus. (p. 139.)

Hugh O'Neill, for the petitioner.

J. W. Tompkins, warden, respondent in propria persona.

634 McFARLAND, J. Joseph Reed, whose discharge from the custody of the warden of the state prison at San Quentin is prayed for in the petition herein, was charged in the superior court with robbery and a former conviction of petit larceny. He confessed the prior conviction and pleaded "Not guilty" to the charge of robbery. On October 22, 1903, he was convicted of an assault with intent to commit robbery; and on November 11, 1903, judgment was entered sentencing him to the state prison for the term of seven years.

It is contended that the judgment above noticed is void for these reasons: Section 220 of the Penal Code provides that a person guilty of an assault with intent to commit robbery is punishable by imprisonment in the state prison "not less than one nor more than fourteen years," and section 666 provides that when a person, having previously been convicted of petit larceny, subsequently commits a crime punishable by imprisonment in the state prison for a term exceeding ten years, such person is punishable by imprisonment in the state prison "not less than ten years"; and it is contended that on account of these provisions the court had no jurisdiction to sentence **635** Reed for a term less than ten years, and that the judgment is therefore void. But this contention is not maintainable. It is not necessary to consider whether, upon appeal by the state, the judgment would be held to be erroneous and the trial court directed to render a judgment of imprisonment for, at least, ten

years. It is not enough on this proceeding of habeas corpus to show that the judgment is erroneous. It must be shown that it is void for want of jurisdiction to render it—and that is not shown here. The judgment does not impose any kind of punishment different from that prescribed by the code, and, as was said in the concurring opinion in *Ex parte Soto*, 88 Cal. 629, 26 Pac. 530, “it is within, and not in excess of, the authority of the statute.” If the judgment had been for ten years, it would have been a judgment for seven years and three years more, and, so far as the mere naked question of jurisdiction is involved, the power to sentence for the longer term includes the power to sentence for the shorter. The judgment is not therefore wholly void; and even if this were a proceeding in which the judgment could be questioned for error, as such error, if any, would have been in favor of Reed, he would not be aggrieved thereby. Moreover, if we could hold here that the judgment is invalid, it is difficult to see what course could be pursued other than to order the trial court to enter the proper judgment for a term not less than ten years, which judgment would be greatly prejudicial to the petitioner, and of course not desired by him: See *People v. Riley*, 48 Cal. 549. Petitioner relies on *Ex parte Bernert*, 62 Cal. 524. That case may possibly be distinguished from the case at bar—as the right of a municipality to pass the ordinance for the violation of which the petitioner there was held, and a conflict between such ordinance and the statute of the state, were largely discussed; but if what was decided in that case is irreconcilably inconsistent with the conclusion hereinbefore stated, it must be considered as, to that extent, overruled.

The prayer of the petition is denied, and the said Reed remanded to the custody of the said warden, and the writ is discharged.

Angellotti, J., Shaw, J., Van Dyke, J., Lorigan, J., Henshaw, J., and Beatty, C. J., concurred.

For Authorities upon the question involved in the principal case, see the monographic note to *Koepke v. Hill*, 87 Am. St. Rep. 195, on habeas corpus to release a prisoner after judgment and sentence. An excessive sentence is not ground for a new trial: *McCollum v. State*, 119 Ga. 308, 100 Am. St. Rep. 171, 46 S. E. 413.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

BANNOCK COUNTY v. BELL.

[8 Idaho, 1, 65 Pac. 710.]

THE STATUTE OF LIMITATIONS Runs Against a County to recover public money wrongfully collected and withheld by one of its fiducial agents, who is an ex-county officer. (p. 143.)

S. C. Winters and F. S. Dietrich, for the appellant.

F. Martin, attorney general, and J. W. Eden, for the respondent.

² **SULLIVAN, J.** This action was brought by Bannock county against the appellant, who was clerk of the district court and ex-officio auditor and recorder of said county for the years 1893 and 1894. The complaint contains two causes of action, one for each of said years. It is alleged in the complaint in the first cause of action that the appellant, as clerk, auditor and recorder of said county, did, on the sixteenth day of January, 1894, present to the board of county commissioners of said county an account for services rendered by the appellant for said county for the year 1893 in his official capacity, amounting to \$805.75; that thereafter, on the seventeenth day of January, 1894, said board allowed said account, except for the sum of \$52.80, and ordered a warrant drawn in favor of appellant for the sum so allowed, to wit, \$752.95; and that said warrant was paid by the treasurer of said county. In the ³ fifth paragraph of the complaint is set out an itemized statement of the items alleged to have been illegally, corruptly, and fraudulently allowed, amounting to \$410.60, and it is alleged that none of said

(140)

items were proper charges against said county, and that by reason of the allowance and payment of said claim the appellant became indebted to said county in the sum of \$410.60; that demand has been made on appellant to pay the same, and he has refused to do so. For a second cause of action the necessary allegations are made charging appellant with having collected from said county, as clerk, auditor, and recorder thereof, for services rendered during the year 1894, illegal fees to the amount of \$329.10. A general demurrer was filed to said complaint and overruled. The answer puts in issue the material allegations of the complaint, and also sets up the statute of limitations. The cause was tried by the court and judgment entered against the appellant for \$1,068.81, interest and costs. This appeal is from the judgment, taken within sixty days after the entry thereof.

The record contains a bill of exceptions purporting to contain all of the evidence taken on the trial. Several errors are assigned, but, in our view of this case, it is necessary to notice but one of them. It is contended that the complaint shows on its face that both causes of action stated therein are and were barred by the statute of limitations. Section 4053 of the Revised Statutes provides that the period within which to commence an action upon a contract, obligation, or liability not founded upon an instrument of writing is four years. Section 4060 of the Revised Statutes provides as follows: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." Section 4061 of the Revised Statutes provides that the limitations prescribed in chapter 3 of said Revised Statutes apply to the state the same as to private parties. The complaint, on its face, shows that the first cause of action accrued on the seventeenth day of January, 1894, and that the second cause of action arose on the fourteenth day of January, 1895. This action was commenced on the twelfth day of ⁴ March, 1900, about five years and two months after the last cause of action arose, about one year and two months after the action was barred by the statute of limitations. Under the provisions of either of said sections 4053 or 4060 of the Revised Statutes said action was barred within four years after the cause of action accrued. Under the provisions of section 4061 the statute of limitation applies to the state as well as to private parties. Section 346 of the Code of Civil Procedure of California is the same as section

4061 of the Revised Statutes, each of which provides that the statute of limitations applies to actions brought in the name of the state in the same manner as to actions by private parties. Under the provisions of subdivision 1, section 339, of the Code of Civil Procedure of California, which contains the same provisions as our section 4053, except the limitation is fixed at two years, the supreme court of that state held that when money belonging to the county is received by the county auditor, an action against him is barred in two years: *San Luis Obispo Co. v. Farnum*, 108 Cal. 567, 41 Pac. 447. It was held in *Board v. Van Slyck*, 52 Kan. 622, 35 Pac. 299, that a cause of action for fees not accounted for and wrongfully retained by the county clerk accrues at the end of each quarter, when the allowance of salary is made; and is barred, under the three year statute of limitations, if the action is not brought within that period. It was also held that the statutory limitation could not be extended by the failure to demand the payment of the fees collected, as no demand was necessary for fees so illegally retained. In *People v. Van Ness*, 76 Cal. 121, 18 Pac. 139, the supreme court of California held that the statute of limitations applies to actions brought by the state for sums collected and held by a public officer, which the statute required him to pay into the public treasury. In *People v. Melone*, 73 Cal. 574, 15 Pac. 294, the supreme court of California held that the statute of limitations applied to the state. That was an action against the Secretary of State to recover fees received by him, which by law he was required to pay over to the state. The following cases hold that the statute of limitations runs against a ⁵ municipal corporation: *In re Opening of Beck Street*, 19 Misc. Rep. 571, 44 N. Y. Supp. 1087; *In re Opening of Fox Street*, 19 Misc. Rep. 571, 44 N. Y. Supp. 1087; *Hartman v. Hunter*, 56 Ohio, 175, 46 N. E. 577; *Gaines v. Hot Springs Co.*, 39 Ark. 262; *City of Bedford v. Willard*, 133 Ind. 562, 36 Am. St. Rep. 563, 33 N. E. 368; *May v. School Dist.*, 22 Neb. 205, 3 Am. St. Rep. 266, 34 N. W. 377; *State v. Dunbar's Estate*, 99 Mich. 99, 57 N. W. 1103. In the opinion in *May v. School Dist.*, 22 Neb. 205, 3 Am. St. Rep. 266, 34 N. W. 377, the court quotes as follows from *Wood on Limitation of Actions*: "In *Wood on Limitation of Actions*, section 53, it is said: 'The maxim, "Nullum tempus occurrit regi" ["Lapse of time does not bar the right of the crown"] only applies in favor of the sovereign power, and has no application to municipal corporations deriving their

powers from the sovereign, although their powers, in a limited sense, are governmental. Thus the statute runs for or against towns and cities in the same manner as it does for or against individuals.' ”

It has been suggested that the statute of limitations does not run against a county to recover public money wrongfully withheld by one of its fiducial agents, and that the clerk received said money as such agent. We cannot concede that view, as the whole current of modern authority is to the effect that implied trusts are within the statute, and that the statute begins to run from the time the money was wrongfully received. In a note to section 343 of the Code of Civil Procedure of California, which section is the same as section 4060 of the Revised Statutes, it is stated that, “by the whole current of modern authorities, implied trusts are within the statute, and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication.” To sustain the position that the statute of limitations does not run against a county, counsel for respondent cites *Fremont Co. v. Brandon*, 6 Idaho, 482, 56 Pac. 264; *Ada Co. v. Gess*, 4 Idaho, 611, 43 Pac. 71; *Elmore Co. v. Alturas Co.*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349; *Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 409. In the first case cited this court held that, the defendant being a fiducial agent of the county, and having received money in trust for the county, the statute of limitations did not run ⁶ against the county in an action to recover such money. The statute of limitations of this state is expressly made applicable to the state. It is, therefore, applicable to the counties of the state, and, so far as the case of *Fremont Co. v. Brandon*, 6 Idaho, 482, 56 Pac. 264, holds that said statute does not run against the county, the same is hereby overruled. The other three cases above cited are not in point in the case at bar. The judgment is reversed and remanded, with instructions to sustain the demurrer, and for further proceedings in conformity with the views expressed in this opinion. Costs of this appeal are awarded to the appellant.

Stockslager, J., concurs.

Mr. Chief Justice Quarles Dissented, and stated that, to his mind, the conclusion of the court was entirely erroneous; that the authorities cited in the majority opinion, with one or two exceptions, did not sustain such conclusion; and that the correct view of the

question presented was shown by the supreme court of Idaho in the cases of *Elmore County v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349, and in *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264, where it was held that an assessor and collector who received a warrant for a salary to which he was not entitled was a fiducial agent, and received such money in trust, and that the statute of limitations did not run against the county as to the money thus received.

THE MAXIM "NULLUM TEMPUS OCCURRIT REGI"

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Scope of Note.

Many phases of the application of the maxim, "Lapse of time does not bar the right of the crown," have been treated in former mono-

graphic notes in this series of reports. Thus, its application to counties, towns and cities was considered in the note to *Arapahoe Village v. Albee*, 8 Am. St. Rep. 206; the statute of limitations and prescriptive rights as applied to highways, streets and parks were treated in the note to *Schneider v. Hutchinson*, 73 Am. St. Rep. 479, while the prescriptive right to continue a public nuisance was discussed in *Mississippi Mill Co. v. Smith*, 30 Am. St. Rep. 557; the subject of limitations as applied to suits to recover personal judgment for taxes in the note to *Richards v. Commissioners of Clay Co.*, 42 Am. St. Rep. 655; the defense of laches to suits by taxpayers in the note to *McCord v. Pike*, 2 Am. St. Rep. 104; the right to acquire title by adverse possession to lands devoted to a public use, which forms an important part of the subject which we are about to consider, was exhaustively treated in the note to *Northern Pac. Ry. Co. v. Fly*, 87 Am. St. Rep. 775; and the application of limitations to quo warranto proceedings, which naturally has an important bearing on the subject, was considered in the note to *McPhail v. People*, 52 Am. St. Rep. 312. Hence, we shall not consider those phases of the subject except to advert to cases decided since the time of such notes, which seem to have an important bearing upon the phases of the subject treated therein, though we shall attempt to consider the subject fully in its other aspects.

I. Nature and Purposes of Statutes of Limitation and the Doctrine of Laches.

It may not be amiss to refer briefly to the nature and purposes of statutes of limitation and the application of the doctrine of laches before discussing the application of the maxim which forms the subject of this note. Statutes of limitation were anciently considered as evidencing a presumption of payment, though now they seem to be regarded more in the nature of statutes of repose. The weight of authority seems also to consider them as affecting merely the remedy, and not as extinguishing the right itself: See monographic note to *Menzel v. Hinton*, 95 Am. St. Rep. 656. The general purposes of such statutes were set forth by Justice Story in the early case of *Bell v. Morrison*, 1 Pet. 360, 7 L. ed. 174, in the following language: "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement

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of accounts and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove and easy to fabricate), applicable to such remote times as may leave no means to trace the nature, extent or origin of the claim, and thus open the way to the most oppressive charges."

The court, in *Townsend v. Vanderwerker*, 160 U. S. 186, 16 Sup. Ct. Rep. 258, 40 L. ed. 383, in discussing the nature of the doctrine of laches, remarked that: "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." So, also, in *Galliher v. Cadwell*, 145 U. S. 372, 12 Sup. Ct. Rep. 873, 36 L. ed. 738, the court, in reviewing some cases bearing on the subject of laches, said: "The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed had knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." And continuing the court summarized the rule, saying: "They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or parties." The same line of reasoning was also set forth in *Neppach v. Jones*, 20 Or. 491, 23 Am. St. Rep. 145, 26 Pac. 569, 849. It is said, however, that ordinarily courts of equity adopt the time fixed by the statute of limitations for barring claims, but this rule is not inflexible: *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, 18 N. E. 334, 1 L. R. A. 327; *Taylor v. Slater*, 21 R. I. 106, 41 Atl. 1001. For a further discussion of the general subject of laches see the monographic note to *Bell v. Hudson*, 2 Am. St. Rep. 795.

II. Nature and Purposes of the Maxim.

a. *Origin and Purpose of the Maxim.*—The history and general purposes of the maxim was set forth in *Levasser v. Washburn*, 11 Gratt. 576, in the following language: "It is a maxim of great antiquity in the English law that no time runs against the crown, or, as it is expressed in the early writers, 'Nullum tempus occurrit regi':

Magdalen College Case, 11 Coke, 68-74, 1 Roll. R. 151; **Bracton**, lib. 2, c. 5, sec. 7; **Britton**, c. 18, p. 29; 8 **Bacon's Abridgment**, 'Prerogative,' E, p. 95; 7 **Comyn's Digest**, 'Prerog.,' D, 86, p. 90. And it may be laid down as a safe proposition that no statute of limitations has been held to apply to suits by the crown, unless there has been an express provision including it: **United States v. Hoar**, 2 **Mason**, 311, **Fed. Cas. No. 15,373**.

"The reason sometimes assigned why no laches shall be imputed to the king is that he is continually busied for the public good and has not leisure to assert his right within the period limited to subjects: **Coke on Littleton**, 90; 1 **Blackstone's Commentaries**, 247. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers: **Sheffield v. Ratcliffe**, **Hob.** 347; **United States v. Hoar**, 2 **Mason**, 311, **Fed. Cas. No. 15,373**; **People v. Gilbert**, 18 **Johns.** 227; **United States v. Kirkpatrick**, 9 **Wheat.** 720-735, 6 **L. ed.** 199. This reason certainly is equally, if not more, cogent in a representative government, where power of the people is delegated to others, and must be exercised by these if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain and formed independent governments within the respective states: **Inhabitants of Stoughton v. Baker**, 4 **Mass.** 522, 3 **Am. Dec.** 236; **People v. Gilbert**, 18 **Johns.** 227; **Kemp v. Commonwealth**, 1 **Hen. & M. (Va.)** 85; **Nimmo v. Commonwealth**, 4 **Hen. & M. (Va.)** 57, 4 **Am. Dec.** 488; **Chiles v. Calk**, 4 **Bibb (Ky.)**, 554; **Commonwealth v. McGowan**, 4 **Bibb (Ky.)**, 62, 7 **Am. Dec.** 737. And though it has sometimes been called a prerogative right, it is in fact nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments: **Per Story, J., United States v. Hoar**, 2 **Mason**, 311, **Fed. Cas. No. 15,373**. Independently of the particular reason above referred to, another has been advanced, founded on the presumed legislative intention. In general, legislative acts are intended to regulate the acts and rights of citizens; and it is a rule of construction not to embrace the government or affect its rights by the general rules of a statute unless it be expressly and in terms included, or by necessary and unavoidable implication": Citing **United States v. Hoar**, 2 **Mason**, 311, **Fed. Cas. No. 15,373**; **People v. Gilbert**, 18 **Johns.** 227.

The case of **People v. Gilbert**, 18 **Johns.** 227, cited in the above quotation, set forth the same reasoning as to the purposes of the maxim. And proceeding on the theory that the maxim was a part of the common law of England, the court said: "By the thirty-fifth article of the state constitution we adopted the common law of England, so far as it formed the law of the colony of New York, on the nineteenth day of April, 1775. After this recognition, the people of this state, as the supreme power, were entitled to claim the ben-

eff of it in the same manner, and to the same extent, that it had been applied in England. On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty, it was equally important to be preserved. By the adoption of the common law of England in this state the people acquired the right and privilege now contended for by the counsel for the plaintiff." Justice Lipscomb, in an early Texas case (*State v. Purcell*, 16 Tex. 307), seemed to doubt whether the maxim was ever a part of the common law. He said: "The maxim that '*Nullum tempus occurrit regi*' is acknowledged to be in common use in the English courts, but that it is a rule of the common law is not so clear; and it may well be questioned whether it can claim to have an existence anterior to the date of the first English statute of limitations, and was then only true so far as it referred to the time fixed by the statute as a bar to particular actions. We think so, because it is very clear that in some instances time would, at common law, mature and constitute a right against the crown. Fifty years being the time that would bar a writ of right, that time of the enjoyment of the actual possession of the crown lands would be conclusive in favor of the right, unless it is shown that the land could not be granted: See *Reed v. Brookman*, 6 Eng. Ch. 82, 12 Coke, 5, and *Parker v. Baldwin*, 11 East, 488. See, also, *Coolidge v. Learned*, 8 Pick. 508. We conclude, therefore, that the maxim relied on by the attorney general in England amounts to nothing more than that the statute of limitations of that country does not run against the crown." Substantially the same reasoning was set forth in *Stanley v. Schwalby*, 147 U. S. 515, 13 Sup. Ct. Rep. 418, 37 L. ed. 259.

In *Martin v. Commonwealth*, 1 Mass. 359, the chief justice, in discussing the application of the maxim to the case at bar, said: "The maxim, '*Nullum tempus occurrit regi*,' does not apply; that extends only to cases where rights are concerned. The question before us relates merely to the mode of proceeding in the cause."

The courts frequently say that laches is not imputable to the government: *State v. Halter*, 149 Ind. 292, 47 N. E. 665; *Josslyn v. Stone*, 28 Miss. 753; *Haehnlen v. Commonwealth*, 13 Pa. St. 617, 53 Am. Dec. 502; *State v. Sponangle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; *United States v. Dallas Military Road Co.*, 140 U. S. 632, 11 Sup. Ct. Rep. 988, 35 L. ed. 560; *San Pedro etc. Co. v. United States*, 146 U. S. 135, 13 Sup. Ct. Rep. 94, 36 L. ed. 911. In *United States v. Williams*, 5 McLean, 135, Fed. Cas. No. 16,721, the court, in advancing some of the reasons why laches was not imputable to the government, said: "But laches is not chargeable to the government. The statute of limitations does not run against it; and on the same principle the lapse of time affords no presumption of payment against the state." And in the recent case of the *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 187, 64 N. E. 549, the court also stated the reason for not imputing laches to the gov-

ernment. It said: "A proposition of law, asked by the appellant, was also refused, holding that, by reason of delay in obtaining satisfaction of the debt sued for, the estate of Ramsay has been released from liability. All that need be said in reply to this contention is that, as a general principle, laches is not imputable to the government. This maxim is said by Judge Story to be founded upon 'a great public policy.' 'The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities': Mechem on Public Offices and Officers, sec. 308; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199. The claim here sued upon is sued in the name of the people of the state of Illinois for the use of the commissioners of the Southern Illinois Penitentiary, and the money sought to be recovered belongs to the government of Illinois."

The court in the recent case of *In re Ash's Estate*, 202 Pa. St. 422, 90 Am. St. Rep. 658, 51 Atl. 1032, seemed to take a different view as to the effect of laches as a presumption of payment than that stated in *United States v. Williams*, 5 McLean, 135, Fed. Cas. No. 16,721, referred to in this section. It said: "When the commonwealth comes into its courts, it is subject, like all other suitors, to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. Statutes of limitation do not apply to it, because the maxim 'Nullum tempus occurrit regi,' though probably in its origin a part of royal prerogative, has been adopted in our jurisprudence as a matter of important public policy. But rules of evidence and legal presumptions are not changed for or against the state as a suitor. A statute of limitation is a legislative bar to the right of action, but the presumption of payment from the lapse of time is not a bar at all, but simply a rule of evidence, affecting the burden of proof: *Miller v. Williamsport Overseers*, 17 Pa. Sup. Ct. 159. It is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interests of repose and the ending of litigation. There is no good reason why it should not apply to the commonwealth just as other legal rules and presumptions do."

b. **As Affecting Claims Against the State or Sovereign.**—Although statutes of limitation cannot be pleaded against the sovereign except by consent, still the weight of authority is that they may be pleaded for the benefit of the sovereign. In *Stanley v. Schwalby*, 147 U. S. 515, 13 Sup. Ct. Rep. 418, 37 L. ed. 259, the court after stating the general rule that the United States was not bound by statutes of

limitation and giving the reasons therefor, said: "But, as observed by Mr. Justice Strong, delivering the opinion of the court in *Dollar Savings Bank v. United States*, 19 Wall. 227, 239, 22 L. ed. 80, while the king is not bound by any act of parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named. And, he adds, that the rule thus settled as to the British crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae* or universal trustee enters as much into our political state as it does into the principles of the British constitution. The general rule is stated in Chitty on the Law of the Prerogatives of the Crown, 382, clearly to be 'that though the king may avail himself of the provisions of any acts of parliament, he is not bound by such as do not particularly and expressly mention him.' 'For it is agreed in all our books that the king shall take benefit of any act, although he be not named': *Calvin's Case*, 7 Rep. 32a; *Magdalen College Case*, 11 Rep. 67, 68; *The Queen and Buckberd's Case*, 1 Leon. 150; 1 Blackstone's Commentaries, 262." And in *Cowles v. State*, 115 N. C. 180, 20 S. E. 884, the court said: "While it may be true that the statute of limitations would not be allowed to bar the prosecution by the state of its claims against the citizen, except for the provisions of the code, section 159, it does not follow from this that the state may not herself plead that statute and interpose its bar to prevent our recommendatory decision against her. It is not for us here to say whether or not there is a moral obligation resting upon the commonwealth to pay the petitioner a certain sum of money, but whether under the law that controls such a controversy when waged between two citizens, the state is indebted to this petitioning citizen. 'Considerations of honor or magnanimity can have no bearing in determining what the law is. The state has referred its rights to judicial tribunals to be decided by the law. If by it the claim is barred, they must so declare, though it might be just and honorable for the state to pay it if it has never been paid, notwithstanding the bar': *Baxter v. Wisconsin*, 10 Wis. 454. This tribunal to which the petitioner now comes to have his alleged rights against the state adjudicated, was open to him for that purpose when his right accrued more than ten years ago. The remedy—such as it is—given him by the constitution and the law for alleged wrong done him by the state was then exactly what it is now. He has seen fit to delay to prosecute his supposed right in the only tribunal open to him for its adjudication. Because of the length of that delay the law has barred his claim, and we cannot declare that the state is legally indebted to him."

The decisions of the courts in *Gaines v. Hot Springs Co.*, 39 Ark. 262, *Schloss v. Pitkin Co.*, 1 Colo. App. 145, 28 Pac. 18, *Small v. State (Idaho)*, 76 Pac. 765, *Perry v. Vermillion Parish*, 21 La. Ann.

645, Hepburn's Case, 3 Bland, 112, *Sturtevant v. Inhabitants of Pembroke*, 130 Mass. 373, *Village of Arapahoe v. Albee*, 24 Neb. 242, 8 Am. St. Rep. 202, 38 N. W. 739, *Capron v. Adams Co.*, 43 Wis. 613, substantially support the same principles enunciated above.

III. Application of the Maxim.

a. To Governmental Bodies in General.

1. **The United States.**—In *United States v. Nashville etc. Ry. Co.*, 118 U. S. 125, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, the court said: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound: *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 438; *United States v. Knight*, 14 Pet. 301, 315, 10 L. ed. 465; *Gibson v. Chouteau*, 13 Wall. 921, 20 L. ed. 534; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *Fink v. O'Neil*, 106 U. S. 272, 281, 1 Sup. Ct. Rep. 325, 27 L. ed. 196. The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States. When the United States, through their lawfully authorized agents, become the owners of negotiable paper, they are obliged to give the same notice to charge an indorser as would be required of a private holder: *United States v. Barker*, 4 Wash. C. C. 464, Fed. Cas. No. 14,520, 12 Wheat. 559, 6 L. ed. 728; *United States v. Bank of Metropolis*, 15 Pet. 377, 392, 393, 10 L. ed. 774; *Cooke v. United States*, 91 U. S. 389, 396, 398, 23 L. ed. 237. They take such paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title; and cannot, therefore, maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations: *United States v. Buford*, 3 Pet. 12, 30, 7 L. ed. 585; *The King v. Morrall*, 6 Price, 24. But if the bar of the statute is not complete when the United States become the owners and holders of the paper, it appears to us, notwithstanding the dictum of Cowen, J., in *United States v. White*, 2 Hill (N. Y.), 59, 61, 37 Am. Dec. 374, impossible to hold that the statute could afterward run against the United States"; citing *Lambert v. Taylor*, 4 Barn. & C. 138, 6 D. & R. 188.

The federal and state courts seem to uniformly hold that statutes of limitation do not run against the United States government: *Wright v. Swan*, 6 Port. 84; *Swann v. Lindsey*, 70 Ala. 507; *McNamee v. United States*, 11 Ark. 148; *Booth v. United States*, 11 Gill & J. 373; *United States v. City of Alexandria*, 19 Fed. 609; *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 538.

It has sometimes been sought to invoke the statute of limitations of a state as a bar to an action in which the United States government is interested as plaintiff, but the courts hold that such a state statute does not run against claims of the United States: *United States v. Spiel*, 8 Fed. 143, 3 McCrary, 107; *United States v. Belknap*, 73 Fed. 19; *United States v. Nashville etc. Ry.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194. In *Gibson v. Chouteau*, 13 Wall. 99, 20 L. ed. 534, Justice Field said: "It is a matter of common knowledge that statutes of limitation do not run against the state. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are also necessarily excluded from the operation of such statutes."

And it is also held that the defense of laches cannot be pleaded against claims of the United States: *San Pedro etc. Co. v. United States*, 146 U. S. 135, 18 Sup. Ct. Rep. 94, 36 L. ed. 911; *United States v. Dallas Military Road Co.*, 140 U. S. 632, 11 Sup. Ct. Rep. 988, 35 L. ed. 560; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Dox v. Postmaster General*, 1 Pet. 318, 7 L. ed. 160.

2. *The State*.—It seems to be universally held that statutes of limitation do not run against the state when suing in its sovereign capacity unless such statutes expressly include the state in their operation: *Swann v. Lindsey*, 70 Ala. 507; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Commonwealth v. McGowan*, 4 Bibb, 62, 7 Am. Dec. 707; *State v. Halter*, 149 Ind. 292, 47 N. E. 665; *Parnille v. McNutt*, 1 Smedes & M. 179; *Parks v. State*, 7 Mo. 194; *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *Blazier v. Johnson*, 11 Neb. 404, 9 N. W. 543; *People v. Van Rensselaer*, 8 Barb. 189; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379; *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, 32 Am. Dec. 718; *Hoey v. Furman*, 1 Pa. St. 295, 44 Am. Dec. 129; *State v. Arledge*, 2 Bail. 401, 23 Am. Dec. 145; *Wilson v. Hudson*, 8 Yerg. 398; *Nimmo v. Commonwealth*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488; *French v. Commonwealth*, 5 Leigh, 512, 27 Am. Dec. 613; *State v. Sponangle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; *Gibson v. Chouteau*, 13

Wall. 92, 20 L. ed. 534. And it also seems that where the state is really interested in the litigation it is immaterial that some one else may have an incidental interest with the state. The rule in that respect was stated in *Glover v. Wilson*, 6 Pa. St. 293, wherein it was said: "It is settled that on grounds of public policy, statutes of limitation do not extend to the commonwealth, nor to suits in the name of some person for her use; for it is not the form of the action which is to govern the operation of the statute: *Commonwealth v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 33; *Ramsey's Appeal*, 4 Watts, 71; *McKeehan v. Commonwealth*, 3 Pa. St. 151. Nor does it, I conceive, make any difference that another party may also be interested in the security taken in part for the use of the state; for this cannot affect her rights, which are always paramount to private considerations. If the mingling of her interests with those of another person, natural or artificial, may work an injury to the party who assumes the burden of securing them, it is either a necessary incident to his position, or a folly in him to assume it unnecessarily. In a case like the present, perhaps the law does not contemplate that a collector of taxes should give distinct bonds to secure the payment, respectively, of the state and county tax, since both are, in the first instance, to be paid into the county treasury, and therefore an unforeseen consequence may be the result, or perhaps by proper pleading the defendant might compel the plaintiff in a suit on such bond to set out how much remained due of the amount levied for county purposes, and how much to the state, so as to enable him to plead the statute effectively as against a portion of the claim. But this has not been done here. The amount proceeded for and defended against is a gross amount, part of which, at least, belongs to the commonwealth. The immunities which pertain to her must, therefore, be permitted to cover the whole sum, rather than the public interest should be subjected to detriment, which might affect her pecuniary interests very seriously."

And in *Haehnlen v. Commonwealth*, 13 Pa. St. 617, 53 Am. Dec. 502, it was held that the right of the commonwealth cannot be lost by the laches of its agents. So, also, in *Josselyn v. Stone*, 28 Miss. 753, it was said that laches is not imputable to the state. And in *State v. Sponaugle*, 45 W. Va. 431, 32 S. E. 283, the court in discussing the general subject said: "But no statute applies laches to the state and the common-law rule says that it does not apply to it." A distinction, however, seems to be drawn where long acquiescence in a right is shown. Thus, in the recent case of *Franzini v. Layland* (Wis.), 97 N. W. 499, which was a case involving the boundary line between the states of Wisconsin and Minnesota, the court said: "Acquiescence, for a long period of time is evidentiary of the right involved between sovereignties as well as between individuals." Similar holdings were made in cases involving boundaries between states in *Indiana v. Kentucky*, 186 U. S. 479, 10 Sup.

Ct. Rep. 1051, 34 L. ed. 329, and *Rhode Island v. Massachusetts*, 4 How. 591, 11 L. ed. 1116.

It would seem to us, however, that the cases just cited involve questions of burden of proof rather than questions of laches.

3. Counties and School Boards.

A. Counties.—At common law counties could not be sued: *Monroe County v. Flynt*, 80 Ga. 489, 6 S. E. 173; *Hitch v. Edgecombe County Commrs.*, 132 N. C. 573, 44 S. E. 30; *Taylor v. Salt Lake Co.*, 2 Utah, 405. In *Prichard v. Commissioners*, 126 N. C. 912, 78 Am. St. Rep. 679, 36 S. E. 353, it was said that "counties are not, in a strictly legal sense, municipal corporations like cities and towns; they are rather instrumentalities of government, and are given corporate powers to execute their purposes, and they are not liable for damages in the absence of statutory provisions giving a right of action against them." And in *Johnson v. Llano County*, 15 Tex. Civ. 421, 39 S. W. 995, the court, in speaking of the general nature of counties, referred to the Texas constitutional provisions which recognized them as legal subdivisions of the state and classified them as municipal corporations, and then said: "But in fact, accurately speaking, counties are not 'municipal corporations,' though that phrase is sometimes used in a broad sense that will include them: *Dillon on Municipal Corporations*, secs. 19, 20. Neither do counties, in and of themselves, and independent of the rights granted to them by the state, possess any of the attributes or functions of sovereignty; and hence, they are not, in the true sense of sovereignty, any part of the state. The state has delegated to them, as it has to cities and towns, certain powers and functions that belong to this state; but it does not follow that because such corporations are intrusted with the exercise of such powers and functions, they are, in all respects, elevated to the dignity of sovereignty." In *Coleman v. Thurmond*, 56 Tex. 520, the court held that the statute of limitations would not run against the county in a suit relative to land dedicated to a county for a public highway. This case was, however, explained in *Houston etc. Ry. Co. v. Travis Co.*, 62 Tex. 16, as having been decided on the theory "that it was the state at large that held the actual, real, beneficial interest in streets, as public highways, and that the county, as a political subdivision, had but a trusteeship in them for the use and benefit of the state at large." And in the same case, the court in discussing the application of the maxim "*Nullum tempus occurrit regi*," said: "The principle upon which the extension of the benefits of the maxim is made seems to rest upon the idea that the statute will not run where the sovereignty is substantially interested in, and vested with, the right and ownership of the subject matter in litigation, and which is sought to be subjected to the operation of the statutes of limitation."

In *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637, the county sued on a promissory note which recited that it was given for money borrowed from the road and canal fund of the county. The court, after discussing the history of the maxim, the subject of this note, said: "The immunity, however, it seems was even at common law an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state. It was so expressly held in the *Lessee of the City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 309, 32 Am. Dec. 718, and in *Armstrong v. Dalton*, 4 Dev. (N. C.) 569; and we are not aware of any case to the contrary. In *Marion County v. Moffett*, 15 Mo. 604, the omission of a public functionary to do an act required by law for the security of the public interest, was not allowed to operate as a release of the security; but the decision had nothing to do with the application of the statute of limitations to cases of that character. The money sued here for belonged to the county and not to the state at large. It was vested in the county by a legislative donation—impressed, it is true, with a trust for local improvements; but yet it belonged exclusively to the county, although for local and not for general purposes."

In *Hartman v. Hunter*, 56 Ohio St. 175, 46 N. E. 577, it was held that a civil action brought by the treasurer of a county to enforce assessments for the construction of township ditches was barred by the statutes of limitation. It was contended, in argument, that although the liability was within the terms of the statute of limitation that it was not affected on account of the public character of the demand. The court reviewed the earlier Ohio cases on the subject and then said: "All attempts to extend the exemption to others than the general and state governments have failed. The terms of the statute except none from its operation and the exemption is a prerogative. Being a privilege of sovereignty, as in England it is the king's plea, so here it is the plea of the sovereign, to be made by it or in its behalf. This view of the subject does not admit of further question in this state." So, also, in *Perry County v. Selma etc. R. Co.*, 58 Ala. 569, which was a proceeding for the recovery of certain taxes, the court, though holding that there was no statute of limitation applicable to the case at bar, said: "A county suing or being sued is not exempt from the operation of the statutes of limitation which cover the action sought to be enforced. They are not privileged from suit, under the principle that 'time does not run against the sovereignty.' They are not the state." In *Board of Commissioners of Wayne Co. v. Helton*, 79 Miss. 122, 29 South. 820, which was a suit to recover on a promissory note given to the county for money borrowed from the school fund, the court held that the constitutional provision of 1890, providing that "statutes of limitations in civil causes shall not run against the state or any subdivi-

sion or municipal corporation thereof," stopped the running of the statute against counties on pending contracts when the bar was not complete. So, also, in *Ward v. Marion County* (on rehearing), 26 Tex. Civ. 361, 62 S. W. 557, 63 S. W. 155, which was a suit upon a tax collector's bond for sums for which he issued receipts without receiving money therefor, the court held that his acts amounted to a misconduct toward which the bond applied and that limitations had run against the suit; the court saying: "The statute of limitations runs against counties, except when the legislature has otherwise provided." The statute of limitations was also applied in *Board of Commissioners v. Van Slyck*, 52 Kan. 622, 35 Pac. 299, to a suit upon the official bond of a county clerk for unaccounted fees. In *San Luis Obispo Co. v. King*, 69 Cal. 531, 11 Pac. 178, which was an action to recover fees collected and received by the defendant as county recorder, the court did not seem to question the application of the statute of limitation under proper circumstances, but seemed to base its decision upon the fact that no demand had been made for the fees. It said: "As the defendant received the moneys collected by him and held the same in trust for the county, the action is not barred. No demand was made until the day before suit." In *County of San Luis Obispo v. Farnum*, 108 Cal. 567, 41 Pac. 447, the action was on the bond of the county auditor to recover license taxes received by him, which were not turned over to the county treasurer. The court held that he did not receive the money in his official capacity, and hence, that there was no liability on the bond and that an action to recover for money had and received was barred by the statute. It seems that the statutes of limitation have been expressly extended to cases of the sort just cited.

The principal case seems to be based upon the ground that the statutes of limitations of Idaho are expressly made applicable to the state and that they are therefore applicable to the counties of the state. It seems to us that there might be some circumstances under which a statute of limitation, though made to apply to a county as to matters of mere private right or contractual obligations would not be applicable where the subject matter of the litigation was in respect to public rights or as to property held by the county in trust for the public good. The distinctions which are drawn by the courts in matters of that kind will be treated later on in this note.

B. School Boards and Districts.—In *State v. School District*, 30 Neb. 520, 27 Am. St. Rep. 420, 46 N. W. 613, which was a proceeding by mandamus to compel a county school board to report the indebtedness of the school district and the rate and amount of taxes required to pay the same, the court held that the proceeding was barred by the statute of limitations. In making its ruling the court said: "In the case of *May v. School District*, 22 Neb. 205, 3 Am. St. Rep. 266, 34 N. W. 377, this rule was maintained. The

plaintiff sued on a warrant for seventy-five dollars, dated September 9, 1879, payable eighteen months after date. More than five years had elapsed after the maturity of the warrant before suit was commenced. The statute of limitations was applied, and it was held that the maxim, 'Lapse of time is no bar to the rights of the sovereign,' applies only to a sovereign state, and not to municipal corporations deriving their powers from the state, although their powers, in a limited sense, are governmental; and thus it appears that the statute runs for and against cities, towns, and school districts in the same manner that it does for and against individuals. Arguments need not be prolonged in support of this proposition. It has been considered and settled''; citing *City of Cincinnati v. Evans*, 5 Ohio St. 594; *City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, 32 Am. Dec. 718; *Lane v. Kennedy*, 13 Ohio St. 42; *St. Charles Tp. School Directors v. Goerges*, 50 Mo. 194; *Kennebunkport v. Smith*, 22 Me. 445; *Clements v. Anderson*, 46 Miss. 581; *Evans v. Erie County*, 66 Pa. St. 225; *St. Charles County v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *Callaway County v. Nolley*, 31 Mo. 393; *Abernathy v. Dennis*, 49 Mo. 469; *Pimental v. San Francisco*, 21 Cal. 351; *Clark v. Iowa City*, 20 Wall. 583; *De Cordova v. Galveston*, 4 Tex. 470; *Underhill v. Trustees etc.*, 17 Cal. 172; *Baker v. Johnson County*, 33 Iowa, 151; 2 *Dillon on Municipal Corporations*, sec. 668. The status of school districts as state or municipal organizations was discussed in *Attorney General v. Lowrey*, 131 Mich. 639, 92 N. W. 289, in both the majority and dissenting opinions.

4. **Municipal Corporations.**—The authorities do not seem to be harmonious on the question whether municipal corporations are affected by statutes of limitations under all circumstances. Of course, the matter is regulated by statute to a large extent. The courts often say, in a general way, that statutes of limitations run against municipal corporations in the same manner as against individuals: *City of Alton v. Illinois etc. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *City of Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Clements v. Anderson*, 46 Miss. 581; *St. Charles Tp. School Directors v. Goerges*, 50 Mo. 196; *Knight v. Heaton*, 22 Vt. 480. Other courts draw a distinction and state that statutes of limitations run against municipal corporations except as to property devoted to a public use or held upon a public trust, and except as to contracts of a public nature: *City of Ft. Smith v. McKibben*, 41 Ark. 49, 48 Am. Rep. 19; *Logan County v. City of Lincoln*, 81 Ill. 158; *Bedford v. Willard*, 133 Ind. 562, 36 Am. St. Rep. 563, 33 N. E. 368; *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326. But this distinction has also been repudiated as unsound: See *City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, 32 Am. Dec. 718. The rule and reasons for the rule as to a distinction where the litigation involves rights of the whole public, and where the litigation

involves merely municipal rights will be considered more fully in a subsequent section.

5. **Foreign Governments.**—We have observed only one case in which the application of the maxim to a foreign government suing as plaintiff in an American court was urged. Although the court refused to give a decision as to whether the foreign government could avail itself of the maxim, still the case is interesting as showing, at least, a dictum upon the subject. In *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427, 24 Sup. Ct. Rep. 145, the French republic as owner and a private corporation of France, as the lessee of the springs of Vichy, France, brought suit against the Saratoga company for an alleged unlawful use of the word "Vichy" in describing defendant's mineral waters, the plaintiffs claiming an exclusive right to the use of the word. The United States supreme court in discussing the case said: "It is said, however, that the doctrine of laches has no application to the neglect of the government to pursue trespassers upon its rights, and that the French republic is entitled to the benefit of that rule. It is at least open to doubt whether the maxim 'nullum tempus,' applicable to our own government, can be invoked in behalf of a foreign government suing in our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not entitled to the benefit of the ordinary defenses at law, is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion.

"However, this may be, it is clear that the rule of nullum tempus cannot be invoked in this case. While the French republic is nominally the plaintiff, its interest in the litigation is little, if anything, more than nominal." The court then showed that the French republic had leased the springs over fifty years ago and that the lease would not expire for thirty years to come, and then continuing the court said: "In such cases, either where the government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary, instead of a public or governmental right, it is clear that it is not entitled to the exemption of nullum tempus, and that the ordinary rule of laches applies in full force"; citing numerous authorities.

b. What Public Bodies Represent the Sovereignty.

1. **What is Meant by Sovereignty.**—Sovereignty has been defined as that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution: *Chancely v. Bailey*, 37 Ga. 532, 95 Am. Dec. 350,

citing Vattel as its authority. In the Georgia case, just cited, it was said, in discussing the sovereign powers of the federal and state governments, that: "The several states by their voluntary executed compact expressly stipulated that the federal government which they created, its officers and agents, should exercise certain enumerated attributes of sovereignty in their joint names, and solemnly stipulated that they would not, either expressly or by necessary implication. The powers granted to the federal government by the states, as expressed in the constitution were intended to be a consolidation of power in that government; to that extent, intended to vest in that government the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals, and as a unit in the execution of those granted powers. It must be conceded, therefore, that the federal government, to the extent of the powers granted to it by the states in the constitution, is, in the language of Washington, a consolidated government, and that the primary object was a consolidation of the Union, at least to that extent: See Washington's Letter Transmitting the Federal Constitution to the Continental Congress. The powers not granted to the government of the United States by the constitution, nor prohibited by it to the states, are expressly reserved to the states, or to the people thereof; and a state, in the language of the supreme court in the case of *City of New York v. Miln*, 11 Pet. 139, 9 L. ed. 648, has the same undeniable and unlimited jurisdiction over all persons and things within its territorial jurisdiction as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. Thus, it is apparent that whatever powers were granted by the voluntary executed compact of the sovereign states to the federal government, to be exercised in their joint names for the preservation and consolidation of the Union as therein expressed, binding upon them to that extent and no more. 'In England, the sovereign power, quoad hoc, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other person in the kingdom can legally resist or annul': Blackstone's Commentaries, 257. The sovereign power of the state of Georgia at the time of the adoption and ratification of the federal constitution was vested in the people of the state as a distinct and separate political organization. Whatever, therefore, they in their sovereign capacity voluntarily bound themselves to do or not to do by the terms and stipulations contained in the constitution of the United States, they could not afterward legally delay, resist or annul by separate state secession from the Union. They were inviolably bound in law by their solemn executed compact; for we have already shown that their declared object was to form a more perfect union of the states, which union was then already declared to be perpetual."

In an early case in Maryland (*Booth etc. v. United States*, 11 Gill & J. 377), the court in discussing whether the statute of limitations of the state applied to the United States, said: "All bonds, etc., taken in the name of the king, etc., are expressly excepted; and the state succeeding to the rights of sovereignty, stood, at the Declaration of Independence, in the place of the king, and being thus expressly excepted, when she surrendered certain powers of sovereignty to the United States, the exception must be considered as applying to such newly created government, thus clothed with portions of her sovereign power. To all claims springing out of the exercise of every sovereign power by the state, and which were due to the state, by express legislation, the doctrine of *nullum tempus*, etc., was applied, and when portions of this sovereign power have been conferred upon another government, and claims spring out of the legitimate exercise of such powers, such newly created government, to the extent of the granted power, must and ought to be considered as standing in the place and stead of the state so granting them; and if the state would have been excepted from the operation of the statute, upon all claims she might have, from the exercise of any power which now has been granted away, the United States, in the exercise of them, is but the substitute of the state, and is entitled to the benefit of the exception likewise. This interpretation of the act does not enlarge the exception, for it is, as before, confined to the sovereign power, which is now by our constitutions parceled out to two governments."

In *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, which is probably one of the latest cases dealing exhaustively with this particular subject, the court said: "The word 'state' is generally used to denote three different things, and often without discrimination: 1. The territory within its jurisdiction; 2. The government or governmental agencies appointed to carry out the will of the people; and 3. The people in their sovereign capacity. The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So statutes of limitations, which are made to apply to the state, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon or recovery of lands held for sale, suits on bonds, contracts, evidences of debt, or for torts—all these, though the state is a party, are subject to bar. As to all such things there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use the public highways, and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way, except according to the express will of the people. It would be a strange

thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other. The former is said to be an attribute of sovereignty, and why not the latter?" And then continuing the court further said: "In all cases where the sovereign rights of the state are referred to, the state is spoken of as representative of the people, and not of the territory or the government, or its agencies. The state, in its government capacity, has no right to alien, or authorize the alienation of, the public highways, except for the public good; but it may provide subagencies to control, make, repair and otherwise exercise complete supervision over such highways, and make such agencies responsible for the good condition thereof, through their servants." And later in the opinion in answering the arguments of the trial judge, the court said: "Judge Johnson invests the state with sovereignty which belongs alone to the people, and of which the state is the mere trustee, except when the word is used in a broad sense, to designate the people, and not governmental agencies. The people have the power to impose the duty of protecting their sovereign rights on any public agency or individual officer or person they may see fit and proper, and the fact that they do impose such duty on trustees or agents cannot possibly destroy such rights without their consent. And it is the duty of every man, woman and child in this state who enjoys the protection of the laws of the land, including the use of its highways, to aid in preserving such public sovereign rights intact, instead of seeking to overthrow and destroy them. The king of England intrusted his highways to supervisors and local authorities, yet it never entered even the imagination of his subjects that by reason thereof they could acquire rights against him in his highways by means of nuisances maintained therein for any length of time. The people of this country succeeded to all his rights, and more than he are compelled to transact their business through local agencies, and there is no more reason that they, by so doing, should lose their rights than he. Their sovereignty is far more pervading than his, for it has representation of pure blood in every household throughout the length and breadth of their domain. The oversight in the learned judge's opinion, and the numerous decisions on which he places his reliance, is his failure to distinguish the municipality in its private, ministerial and local governmental capacities from the municipality in its higher governmental as the agent of the public, charged with the duty of preserving the sovereign rights of the people."

2. Status of Governmental Bodies as Representing the Sovereignty.—From the preceding section, it appears to us that the United States and the state ordinarily represent the sovereignty, at least,
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when exercising the attributes of sovereignty, but it does not seem to us that it necessarily follows that all acts by the United States or the state are sovereign in character.

In *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 26 N. E. 778, 11 L. E. A. 370, which was a suit over a certificate of indebtedness issued by the state, the court said: "As there is a perfect contract, the state is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. In entering into the contract it laid aside its attributes as a sovereign, and bound itself, substantially, as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state, whenever it enters into an ordinary business contract: *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962, 29 L. ed. 185; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Gray v. State*, 72 Ind. 567; *State v. Cardoza*, 8 S. C. 71, 28 Am. Rep. 275; *People v. Canal Commissioners*, 5 Denio, 401; *Georgia etc. Co. v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 534; *Grogan v. San Francisco*, 18 Cal. 590. The principle that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract."

The status of counties was discussed in a previous section; hence we will not add much to what was there said in regard to them. The exact status of counties does not appear to be absolutely established. In *Commonwealth v. Brice*, 22 Pa. St. 211, 60 Am. Dec. 79, it was said: "The fact that a county has certain rights recognized in law as its own does not sever it as a body from the state; but only distinguishes it in the state, and as a part of it, and allows local officers to enforce, in the name of the county, certain rights and duties which otherwise would have had to be enforced in the name of the state. The institution of local divisions is merely a means of government, and counties and their officers are but parts of the machinery that constitute the public system. This form of administration is no more a division of the government than is the allotment of particular localities, or particular functions, to what are usually called state officers." In *Fry v. County of Albemarle*, 86 Va. 195, 19 Am. St. Rep. 879, 9 S. E. 1004, the court in discussing the difference between counties and municipal corporations, said: "As was said by a learned judge in a case not now modern: 'Counties are at most but local organizations, which for the purposes of civil administration are invested with a few functions, characteristic of a corporate existence. They are local subdivisions

of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them': *Hamilton County v. Mighels*, 7 Ohio St. 109.

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of its locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization, and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel, and of transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."

Substantially the same characterization was made of parishes, which corresponds to counties, in *West Carroll v. Gaddis*, 34 La. Ann. 928, the language of which was quoted and adopted in *Jefferson County v. Grafton*, 74 Miss. 435, 60 Am. St. Rep. 516, 21 South. 247, 36 L. R. A. 798. In *Bell v. Commissioners*, 127 N. C. 91, 37 S. E. 136, it was held that counties are not, in a strictly legal sense, municipal corporations, like cities and towns, but that they are rather instrumentalities of government, and are given corporate powers for the execution of their purpose.

As bearing upon the general nature of counties, see, also, *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; *Louisville etc. R. Co. v. County Court*, 1 Sneed, 637, 62 Am. Dec. 424; *Coles v. County of Madison*, Breese (Ill.), 154, 12 Am. Dec. 161; *County of Chester v. Brower*, 117 Pa. St. 647, 2 Am. St. Rep. 713, 12 Atl. 577; monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 119.

In *Adams v. Illinois Central R. Co.*, 71 Miss. 752, 15 South. 640, it was held that the Yazoo-Mississippi Delta Levee District, created by statute and recognized by the constitution, was a subdivision of the state against which the general statutes of limitation did not run. In *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977, the statute of limitations was set up against a claim by a public asylum for board of an inmate and the asylum contended that the maxim "*Nullum tempus occurrit regi*" applied as to its transactions. The court, in holding that limitations applied, said: "We are of opinion that this contention is not sound, and that the error assigned is well taken. The Western Lunatic Asylum is a corporation—an organized legal entity—a personality in law with power to sue and be sued, to plead and to be impleaded; and being endowed with this capacity, it is thereby entitled to and amenable to all legal defenses which pertain to private

persons. In the case of the *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 984, 6 L. ed. 244, Marshall, C. J., says: 'The state does not, by becoming a corporation, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it. . . . The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator and exercises no other power in the management of the corporation than one expressly given by the incorporating act.' 'So with respect to the Bank of the United States. Suits brought by or against it are not understood to be brought by or against the United States': See, also, *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, and *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 6 Am. St. Rep. 644, 1 S. E. 740.

c. Effect of Statutes Expressly Applying Limitations.

1. *Necessity for Sovereign to be Expressly Named.*—In *United States v. Nashville etc. Ry.*, 118 U. S. 120, 6 Sup. Ct. Rep. 106, 30 L. ed. 81, it was held "that the United States asserting rights vested in them as a sovereign government are not bound by any statute of limitations unless Congress has clearly manifested its intention that they should be so bound": See, also, *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *United States v. Backus*, 6 McLean, 443, Fed. Cas. No. 14,491; *San Francisco Savings Union v. Irwin*, 28 Fed. 708; *Booth etc. v. United States*, 11 Gill & J. 373, to the same effect.

And in *United States v. Thompson*, 98 U. S. 488, 25 L. ed. 194, the court, in holding that the United States is not bound by a state statute of limitation, said: "This case turns upon a statute of the state of Minnesota, which bars actions *ex contractu*, like this, within a specified time, and the same limitation is applied by statute to the state. The United States are not named in it. The court below held that the statute applied to the United States, and rendered judgment against them.

"There is no opinion in the record, and we are at a loss to imagine the reasoning by which the result was reached. The federal courts have been in existence nearly a century. The reports of their decisions are numerous. They involve a great variety of questions and the fruit of much learned research. We have been able to find but two cases in the lower federal courts in which it appears the question was raised. They are *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373, and *United States v. Williams*, 5 McLean, 133, Fed. Cas. No. 16,721. In both, it was held, without

the intimation of a doubt, that a state statute cannot bar the United States. The same doctrine has been several times laid down by this court; but it seems always to have been taken for granted, and in no instance to have been discussed either by counsel or the court: *United States v. Buford*, 3 Pet. 12, 7 L. ed. 585; *Lindsey v. Miller's Lessee*, 6 Pet. 666, 8 L. ed. 538; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534.

"This state of things indicates a general conviction throughout the country that there is no foundation for a different proposition. There are also adjudications in the state reports upon the subject but they concur with those to which we have referred. Among the earliest of them is *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236. In that case Chief Justice Parsons said: 'No laches can be imputed to the government, and against it no time runs so as to bar its rights.' The examination of the subject by Judge Story in *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373, is a fuller one than we have found anywhere else. He and Parsons are in accord. So far as we are advised the case before us stands alone in American jurisprudence. It certainly has no precedent in the reported adjudications of the federal courts." And continuing the court said: "The only argument suggested by the learned counsel for the defendants in error is that the judiciary act of 1789, re-enacted in the late revision of the statutes, declares 'that the laws of the several states, except where the constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' It is insisted that the case in hand is within this statute. To this there are several answers.

"The United States not being named in the statute of Minnesota, are not within its provisions. It does not and cannot 'apply' to them. If it did, it would be beyond the power of the state to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the state legislature in passing the act, as it certainly was not of Congress in enacting the law of 1789: *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *Field v. United States*, 9 Pet. 182, 9 L. ed. 94. The federal courts are instruments competently created by the nation for national purposes. The states can exercise no power over them or their proceedings except so far as Congress shall allow. This subject was considered in *Farmers' etc. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196, and we need not pursue it further upon this occasion": See, also, *United States v. Spiel*, 8 Fed. 143, 3 McCrary, 107; *United States v. Belknap*, 73 Fed. 19, to the same effect. But also see *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. Rep. 418, 37 L. ed. 259, to the effect that the United States may avail itself of the benefits of a state statute of limitation as a defense.

It seems to be universally held that statutes of limitation do not run against the state unless the state is expressly named in the statute, as being included amongst those against whom it is to operate: *Ware v. Greene*, 37 Ala. 494; *Swann v. Lindsey*, 70 Ala. 507; *Madison County v. Bartlett*, 1 Scam. (Ill.) 70; *State v. School District*, 34 Kan. 237, 8 Pac. 208; *Hardin v. Taylor*, 4 T. B. Mon. 516; *Booth etc. v. United States*, 11 Gill & J. 373; *Parks v. State*, 7 Mo. 194; *People v. Gilbert*, 18 Johns. 227; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379; *Commonwealth v. Johnson*, 6 Pa. 136; *Harlock v. Jackson*, 3 Brev. (S. C.) 254; *Governor v. Allbright*, 21 Tex. 753; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248; *State Treasurer v. Weeks*, 4 Vt. 215. In *Josselyn v. Stone*, 28 Miss. 763, the court in advancing reasons why statutes of limitation would not operate against the state unless the state was expressly included within their operation, said: "It is a universally recognized rule that no laches is to be imputed to the state and against her; that no time runs so as to bar her rights. This is a great principle of public policy, intended to secure the rights and property of the public against loss or injury by the negligence of public officers and agents. And upon the same reason, it is the settled doctrine that the general words of a statute do not include the state or affect her rights, unless she be specially named, or it be clear and indisputable from the act that it was intended to include the state": Citing *People v. Gilbert*, 18 Johns. 228; *United States v. Hoar*, 2 Mason, 314, Fed. Cas. No. 15,373; *Stoughton v. Baker*, 4 Mass. 528, 3 Am. Dec. 236; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561.

2. **Construction of Limitation Statutes Affecting Governmental Bodies.**—It seems to be a general rule of construction of statutes that general words used in a statute will not apply to the United States or a state to the detriment of their sovereign rights or interests unless such an intent clearly appears from the language used. Thus it was said in *Dollar Savings Bank v. United States*, 19 Wall. 239, 22 L. ed. 80, that: "It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they tend to restrain or diminish any of his rights or interests: *Magdalen College Case*, 11 Coke, 74; *King v. Allen*, 15 East, 333. He may even take the benefit of any particular act though not named: 7 Coke, 32; *Potter's Dwarries on Statutes*, 151, 152. The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states and practically in the federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae*, or universal trustee, enters

as much into our political state as it does into the principles of the British constitution: *Commonwealth v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 33; *People v. Rossiter*, 4 Cow. 143; *United States v. Davis*, 3 McLean, 483, Fed. Cas. No. 14,929; *United States v. Williams*, 5 McLean, 133, Fed. Cas. No. 16,721; *Commonwealth v. Johnson*, 6 Pa. St. 136; *United States v. Greene*, 4 Mason, 427, Fed. Cas. No. 15,258; *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *United States v. Hewes*, Crabbe, 207, Fed. Cas. No. 15,359."

And Justice Story, in the much cited case of *United States v. Hear*, 2 Mason, 314, Fed. Cas. No. 15,373, in a case involving the application of the maxim in connection with a statute of limitation, said: "But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." This language was approved in *Stanley v. Schwalby*, 147 U. S. 515, 13 Sup. Ct. Rep. 418, 37 L. ed. 259. And in *State v. School District*, 24 Kan. 242, 8 Pac. 208, the court, in discussing the rules of interpreting statutes of limitation in their application to the state, said: "Even where there is a doubt as to whether the state was intended to be included within the provisions of the statute, the doubt must be solved in favor of the state and the state held not to be included: *Des Moines County v. Harker*, 34 Iowa, 84, and cases there cited." See, also, on this point, *Minturn v. Larue*, 23 How. (U. S.) 435, 16 L. ed. 574; *State v. Garland*, 7 Ired. (29 N. C.) 48; *City of Pella v. Scholte*, 24 Iowa, 283, 298, 95 Am. Dec. 729; *Hall v. Byrne*, 1 Scam. 140.

In *County of Des Moines v. Harker*, 34 Iowa, 84, the court held that the words "bodies corporate and politic," used in a statute of limitation, would not include the state in its operation. The court said: "There are subjects to which this statute can be applied in all its language and force without including the state. The legislature does not, when prescribing a rule for the state, call it a 'body politic and corporate.' It is not probable such a designation can be found in the entire history of our legislation."

The case of *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 83 S. E. 326, discussed the application of the statutes of limitation with reference to the adverse possession of a street. The case went into the policy of the maxim "*Nullum tempus occurrit regi*" very exhaustively, and is perhaps one of the latest cases dealing as exhaustively with that particular branch of the subject. The opinion does not show the wording of the statute of limitation, which it was contended barred the state, but the court held that it did not operate against the state because the suit involved the rights of the public in a highway. The court, after citing several provisions of the state constitution to that effect, said that: "The people, in their collective capacity, are sovereign. To them all so-called 'prerogative rights' belong, and from them they cannot be taken, or in anywise diminished except in accordance with their own appointment." Then proceeding from this premise, the court said: "The word 'state' is generally used to denote three different things and often without discrimination: 1. The territory within its jurisdiction; 2. The government or governmental agencies appointed to carry out the will of the people; and 3. The people in their sovereign capacity. The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So statutes of limitations, which are made to apply to the state, do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits or bonds, contracts, evidences of debt, or for torts—all these, though the state is a party, are subject to bar. As to all such things, there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use public highways and other rights, which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever, except according to the express will of the people. It would be a strange thing for an individual to plead the statute in bar of the right of eminent domain, which is said to be the right of the people to take private property for public use. The right to keep it for public use should be as extensive as the right to take it; for one would be useless without the other. The former is said to be an attribute of sovereignty, and why not the latter?"

It seems to us that it might logically be concluded from the case just cited (if it enunciates sound law) that even where the word "state" is expressly used in a statute of limitations, that the statute of limitation is not operative against the state in a case wherein the subject matter of the litigation involves a public right as distinguishable from a transaction in the nature of an ordinary business transaction. Hence, the question for determination under such cir-

circumstances, would be whether the subject matter of the litigation involved the exercise of sovereign functions on the part of the state or governmental body attempting to act in the sovereign capacity. And it would also seem to follow that it would be necessary in order to make a statute of limitation applicable to the state in a matter involving a public right, that the passage of the statute be authorized by the people of the state under such forms as the state constitution would provide for the relinquishment of a right of that character, or that the statute be clearly authorized by the state constitution. For a further discussion of this subject see, also, the next section.

Very often in determining whether certain statutes of limitations apply to an action to enforce official bonds or collect taxes, the question is raised whether the liability of the defendant is one created by statute, the statute sought to be set up in bar having application to such liabilities. Questions of that sort arose in *Placer Co. v. Dickenson*, 45 Cal. 12; *Graham County Commrs. v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Kenton County v. Lowe*, 91 Ky. 367, 16 S. W. 82; *Louisville etc. Co. v. Commonwealth*, 108 Ky. 717, 57 S. W. 624, 626; *State v. Sage*, 75 Minn. 448, 78 N. W. 14; *State v. Baker County*, 24 Or. 141, 33 Pac. 530; *State v. Davis*, 42 Or. 84, 71 Pac. 68, rehearing in 72 Pac. 317; *Bristol v. Washington Co.*, 177 U. S. 183, 20 Sup. Ct. Rep. 585, 44 L. ed. 701.

d. Rights of Governmental Body When a Litigant.

1. **In General.**—In *Re Ash's Estate*, 202 Pa. St. 422, 90 Am. St. Rep. 658, 51 Atl. 1030, it was said: "When the commonwealth comes into its courts, it is subject like all other suitors to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. Statutes of limitation do not apply to it, because the maxim 'nullum tempus occurrit regi,' though probably in its origin a part of royal prerogative, has been adopted in our jurisprudence as a matter of important public policy. But rules of evidence and legal presumptions are not changed for or against the state as a suitor. A statute of limitation is a legislative bar to the right of action, but the presumption of payment from the lapse of time is not a bar at all but simply a rule of evidence, affecting the burden of proof." In *Lynch v. United States*, 13 Okla. 142, 73 Pac. 1095, which was a suit by the United States to cancel a land patent, the court said: "The United States stands in no different relation as a suitor than any individual. When the government comes into a court to submit a question to judicial determination, she is not acting in her capacity as a sovereign but as a litigant claiming the same rights and bound by the same rules as any of her citizens under similar circumstances. This was expressly held in *United States v. Bank of Metropolis*, 15 Pet. 377,

10 L. ed. 774; *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. ed. 547; *United States v. Hughes*, 11 How. 552, 13 L. ed. 809; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29 L. ed. 110." See, also, *State v. Kennedy*, 60 Neb. 300, 83 N. W. 87, and *State v. Zanco*, 18 Tex. Civ. App. 127, 44 S. W. 527.

It would seem that where the state is the real party in interest, it is bound by the result of the litigation, even though the litigation was conducted by a municipal corporation. Thus, in *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54, Justice De Haven in rendering the opinion, said: "The city and county of San Francisco is a municipal corporation created by the legislature of the state, and has conferred upon it by the state full power and jurisdiction over the public squares within its territorial limits, with the right to sue and be sued, and this necessarily includes the authority to maintain and defend all actions relating to its right to subject to the public use such squares or land claimed by it to have been dedicated for such purposes; and in any action brought by it for the purpose of vindicating and protecting the public rights in such squares, or land claimed as such, the state would be bound by the result because in such action the city and county would in fact represent the people of the state by virtue of the authority given it to maintain such actions for the purpose of preserving the public rights of which it is the trustee. A municipal corporation is for many purposes but a department of the state organized for the more convenient administration of certain powers belonging to the state: *Sinton v. Ashbury*, 41 Cal. 530; *Barnes v. District of Columbia*, 91 U. S. 544, 23 L. ed. 440; *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799; and such corporations, in their management and control over streets and squares within their limits, and in actions for the vindication and preservation of the public rights therein exercise a part of the sovereignty of the state."

The position of county or municipal corporations toward its citizens and taxpayers as trustees in actions brought by them relative to matters affecting the general welfare is treated in *Freeman on Judgments*, section 178.

In *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 6 Am. St. Rep. 644, 1 S. E. 740, the plaintiff claiming to be a part of the commonwealth of Virginia, commenced suit in West Virginia. The court, after discussing the real status of plaintiff, said: "But conceding, as claimed by the plaintiff, that this corporation and the commonwealth of Virginia are one and the same, and that it must be treated here as possessing all the attributes and immunities which belong to the sovereign commonwealth of Virginia, still, when Virginia seeks redress and becomes a suitor in the courts of this state and beyond her territorial limits, she must lay aside her attributes and immunities of sovereignty, and assert her demands as private

individuals or corporations assert theirs in those courts, subject to the same laws and limitations. Sovereignty, though supreme within its own jurisdiction and territory, does not extend beyond these; and when a sovereign state enters the courts of a foreign state, she does so with no other rights and immunities than those which pertain to private corporations or individuals: *Esley v. People*, 23 Kan. 510. The *lex fori* governs in the limitation of actions: *Johnson v. Anderson*, 76 Va. 766."

2. **Where Governmental Body is Merely a Nominal Plaintiff.**—In *United States v. Beebe*, 127 U. S. 344, 8 Sup. Ct. Rep. 1083, 32 L. ed. 121, the court remarked that "the principle that the United States are not bound by any statute of limitation, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt: *United States v. Nashville etc. Ry. Co.*, 118 U. S. 120, 125, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, and cases there cited. But this case stands upon a different footing and presents a different question. The question is, Are these defenses available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation but has allowed its name to be used therein for the sole benefit of a private person? It has not been unusual for this court, for the purpose of justice, to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear in the record." The court then cited and commented on *In re Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. Rep. 176, 27 L. ed. 656, *United States v. Nashville etc. Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278, 28 L. ed. 822, *Miller v. State*, 38 Ala. 600, *McNutt v. Bland*, 2 How. 9, 11 L. ed. 159, *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 10, as cases sustaining the proposition that the court could properly ascertain whether the sovereign body was the real party in interest, after which it said: "We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into matters pleaded against him by the other party, nor stop the court from ex-

aming into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

In *State v. Halter*, 149 Ind. 297, 47 N. E. 665, which was an action to recover certain penalties fixed by statute for giving false lists of taxable property, the court, after reviewing some of the cases on the subject as to whether the state was the real plaintiff, said: "The distinction that runs through all the cases is the difference between an action in the name of the state to protect the interest of the public, and an action to enforce a private right for the sole benefit of a private person. Upon reason and authority, therefore, the rule is that, when the statute of limitations is pleaded in an action where the state is plaintiff, the court must determine, from an examination of the entire record, whether the action seeks to enforce a public right, in the interest of the public, or a private right, for the benefit of a private person. If to enforce a public right, in the public interest, the statute of limitations is not applicable; but if to enforce a private right, in a private interest, the statute is applicable, although the state is named as plaintiff.

"It becomes necessary, therefore, to determine whether this action is brought in the interest of the public, to enforce a penalty for the benefit of the public, or whether it is merely a private action, to enforce liability in a private interest." The court then discussed the nature of the proceeding and held it to be of a public nature.

In *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210, the controversy arose over the refusal of a trial judge to issue a writ of mandate on the petition of a private individual. The court, in discussing the application of the statutes of limitation to the proceeding, said: "The state of Georgia is not the real party to the proceeding. She is not asserting any right, and is not before the court. The petition for a mandamus is by a private individual, and it was upon that petition alone that the decision complained of was made. But if the writ had issued, and the writ of error was founded upon alleged errors in a judgment growing out of the writ and the return, then the state would be no party. The process, it is true, is in the name of the state, but the right asserted is a private right; the issue is between two of the state. I have already stated that this court has determined that a proceeding by mandamus, upon the relation of a private person, is in the nature of a suit. It is in England called a prerogative writ. It is there held the process by which the crown exerts a high prerogative, through the courts of justice. The prerogative of asserting for a subject a right which could not be otherwise asserted or enforced. This prerogative here belongs to the people. They exert it through their courts of justice by using the name of the state, and although the writ of mandamus is governed by principles peculiar to itself, yet to all practical intents and purposes it is a suit. In this view of the subject, we conclude that the maxim 'Nullum tempus occurrit regi' has no relevancy."

The same principles were announced in *Miller v. State*, 38 Ala. 600, in the following language: "Though the state is a party to this suit, it has no real interest in the litigation. If there be a right of recovery, the property sued for belongs, not to the state, but to the township; so that in point of fact the suit is substantially between the township and the defendant [the action was brought by the state "for the use of" the township]. The code expressly provides that, in all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party on the record: Code, secs. 2130, 2383. In our opinion, the rule that the statute of limitations does not run against the state has no application to a case like the present, where the state, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person."

The principle that the statutes of limitation will run against the sovereignty where it is merely a nominal and not the real plaintiff was also asserted in *Molton v. Henderson*, 62 Ala. 426; *United States v. Southern Pacific R. Co.*, 39 Fed. 132; *United States v. Des Moines etc. R. Co.*, 70 Fed. 435; *Parmilee v. McNutt*, 1 Smedes & M. 179; *State v. Pratte*, 8 Mo. 286, 40 Am. Dec. 140; *Commonwealth v. Baldwin*, 1 Watts, 54, 26 Am. Dec. 83; *Montgomery v. Hernandez*, 12 Wheat. 134, 6 L. ed. 575.

3. *Litigation Affecting Public Rights*.—In the well-considered case of *County of Piatt v. Goodell*, 97 Ill. 90, the court discussed not only the distinction as to the application of statutes of limitation where the rights were public in character and where they were private, both as to states and the minor subdivisions of states, but it also adverted to the so-called doctrine of equitable estoppel. The language of the court in that case expresses very clearly the trend of argument used by other courts in discussing the subject. The controversy in that case arose over a claim of adverse possession to a tract of swamp land owned by the county under a color of title acquired by a tax title, although the land was in fact not liable for taxes. The court said: "The real and vital question in this case would seem to be, Can the title of lands belonging to a county, which are not held for some public use or trust, and which the county may at pleasure sell and convey without any breach of duty, be defeated by possession and payment of taxes under color of title made in good faith, for a period of seven years, in the same manner as if they belonged to an individual?"

"The solution of this question necessarily leads to a consideration of the more general inquiry, whether municipal corporations—using the term in its most extended sense—like individuals, are subject to general statutes of limitation. 'Nullum tempus occurrit regi' is one of the ancient maxims of the common law, and is the natural offshoot of the maxim, 'Rex non potest peccare.' Inasmuch as by the latter maxim the king was regarded as incapable of doing a

wrong, it necessarily followed that negligence or laches could not be attributed to him, and it was held, therefore, at an early day, that the king was not subject to statutes of limitations, except when expressly named, and such has been the law from that period to the present.

"The same doctrine has generally been recognized by the courts of this country, both national and state, as applicable to the federal and state governments. And the same general doctrine, with certain limitations, has by the same courts, with more or less uniformity, been extended to other municipal and quasi municipal corporations, such as cities, towns, counties, etc. It is clear from the authorities, that these latter corporations have not the same immunity from the operation of limitation laws, and the effects of unreasonable delays, in the enforcement of their rights, or the performance of their duties, as the federal and state governments have.

"In *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479, which was an action of ejectment, brought by the city to recover a strip of land constituting a part of the public landing, it was objected, among other things, that the action was barred by the limitation act of 1835, requiring certain real actions to be brought within seven years after possession taken of the premises sought to be recovered. But the objection did not prevail, the court holding that the city did not fall within the provisions of that act, and in disposing of the question it was there said: 'Without stopping to inquire whether the rule that laches is not imputable to the public, or that time does not run against the government, applies to inferior municipal incorporations, such as towns, cities and counties, as well as to the state, we entertain no doubt that this statute has no application to the case before us. Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use; but she cannot alien or otherwise dispose of them for her own exclusive benefit; nor are they subject to the payment of her debts. At most she but holds them in trust for the benefit of the public. The right to the use of the property is not limited exclusively to the citizens of Alton, but the citizens of the state generally have an equal right with them in the appropriate enjoyment of the dedication. This is not like the case of property purchased by the city for her own exclusive use, which she could dispose of at her pleasure. Whether an adverse possession would run against property thus held we do not now propose to inquire; but we entertain no doubt that this statute does not apply to this case, and that the rights of the public in this dedication have not been forfeited by nonuser or barred by adverse possession.'

"It will be perceived that the court, in the case just cited, expressly refused to consider the general question, whether inferior municipal corporations, such as towns, cities and counties, are exempt from the operation of general statutes of limitations, and that the decision is placed upon the express ground that the land in controversy was held by the city in trust for the use of the people of the state generally, and not for the exclusive use of the people of the city, and that by reason of its being thus held, the city had no authority or power to sell the same, or use it for other purposes than those for which it had been dedicated. Nevertheless the case, in view of the grounds upon which it is placed, is an authority in favor of the proposition that there is a well-founded distinction between cases where the municipality is seeking to enforce a right in which the public in general have an interest in common with the people of such municipality, and cases where the public have no such interest. Otherwise that decision could not be sustained upon the grounds stated. But the distinction in question does not rest alone upon that case. It is recognized in numerous well-considered cases, and by the ablest elementary writers.

"Even in cases where it is conceded that the rights involved are such as the public in general have an interest in common with the people constituting the municipality, the authorities do not universally hold that such rights cannot be lost under peculiar circumstances by nonuser or adverse possession. But cases of this character rest rather upon the doctrine of estoppels in pais than upon limitation laws strictly so called. The mere nonuser or adverse possession alone would not have this effect. In all such cases some other element must enter into them, which would render it inequitable to enforce the rights.

"Dillon, in his work on Municipal Corporations, after discussing the subject under consideration in the light of the numerous decisions bearing upon it, sums up his own conclusions in the following language: 'Municipal corporations, as we have seen, have, in some respects, a double character—one public, the other (by way of distinction) private. As respects property not held for public use, as streets, commons, etc., and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no laches on its part or that of its officers can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but if so, such cases will

form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. But there is no danger of recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the court to decide the question, not by mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require.'

"The general conclusions reached by this distinguished author and jurist, as here laid down, have been substantially recognized in a number of adjudicated cases by this court: See Logan County v. City of Lincoln, 81 Ill. 156; Chicago etc. R. Co. v. City of Joliet, 79 Ill. 25."

And in concluding the opinion, the court said: "Upon a careful consideration of the authorities, the better opinion would seem to be that municipal corporations in all matters involving mere private rights, as contradistinguished from public rights, strictly so called, are subject to limitation laws to the same extent as private individuals. On the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws as such. But, in the latter class of cases, courts, occasionally, under special circumstances, which would make it highly inequitable or oppressive to enforce such public rights, interpose by holding the municipality estopped doing so.

"Testing the case before us by the principles here announced, the plaintiff had no right to recover. The right of the county to the tract of land in controversy was not of that public character as exempted it from the operation of the limitation act of 1839. The county had a perfect right to sell or otherwise dispose of the same at pleasure at any time before the statute run. The public generally had no interest in it in common with the citizens and taxpayers of that county."

And in the very recent case of *McCartney v. People*, 202 Ill. 51, 66 N. E. 873, the supreme court again announced that the statute of limitations does not run against a municipal corporation acting in the discharge of a public duty. So, also, in *Village of Augusta v. Tyner*, 197 Ill. 242, 64 N. E. 378, it was held that limitation statutes do not run against a village in respect to adverse occupation of a street. In *Schneider v. Hutchinson*, 35 Or. 253, 76 Am. St. Rep. 474, 57 Pac. 324, to which is attached a monographic note on the adverse possession of public property where the subject is exhaustively treated, the court in laying down the principles in connection with this subject, said: "A distinction is sometimes made or sought to be made in this regard between actions brought by the state in its sovereign and in its proprietary capacity, and the authorities show much diversity in the decisions and reasoning upon this subject. But this distinction is generally suggested in the discussion of the question as to when and in what cases, if any, the statute of limi-

tations will apply to actions brought by the state, when it is not expressly made applicable to such actions by its terms; and as said by Mr. Chief Justice Gillilan in *St. Paul v. Chicago etc. Ry. Co.*, 45 Minn. 396, 48 N. W. 17: 'The usefulness of the cases and text-books cited as guides has been mainly done away with by the statutes. The general statute of limitations seems, and was undoubtedly intended to include every case of an action brought by a private person. Section 18 provides: "The limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens." . . . There is no distinction suggested in either of these statutes between actions brought as "sovereign," or in a governmental capacity, and those brought as "proprietary," or such as a private person might bring for the same or similar purpose. To hold that it was the intention to make or preserve such a distinction, so as to exclude from the operation of the statutes any actions, in whatever capacity the right involved may be claimed, would be applying a strict rule of construction, contrary to the rule that statutes of limitation, being statutes of repose, are to be liberally construed, so as to effectuate the intention of the legislature.' The decision from which this quotation is taken was made under a statute on all-fours with ours, and is, therefore, very much in point in the present discussion. It was an action brought to recover possession of certain land in the city of St. Paul, which it was alleged was a public levee, and a defense of the statute of limitations prevailed. See, also, the following decisions made under a similar statute: *Abernathy v. Dennis*, 49 Mo. 469; *St. Charles' Tp. School Directors v. Goerges*, 50 Mo. 194; *Burch v. Winston*, 57 Mo. 62. No distinction is to be found in the decisions, under statutes providing that actions by the state shall be barred within a specified period, between actions brought in its sovereign and those brought in its proprietary capacity, but all alike are held to be within the terms of the statute. There is a line of authorities, however, which hold that such statutes have no application to actions concerning property held by the state for public purposes without power of alienation: *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799. But these authorities, if sound, can have no application to the question in hand, because the board of commissioners for the sale of school and university lands not only has the power and authority to alienate and dispose of school lands, but it is expressly made its duty to do so: *Hill's Annotated Laws*, secs. 3598, 3602." As bearing on this discussion, see, also, the case of *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, commented on in the preceding subdivision relating to the construction of limitation statutes affecting governmental bodies, and also see the monographic note to *Am. St. Rep. Vol. 101-12*

Schneider v. Hutchinson, 76 Am. St. Rep. 479, on the "Adverse Possession of Public Property."

The distinction sought to be drawn as to the application of statutes of limitation to municipal corporations where the matter involved is public in character and where it is merely local, was also adverted to in *City of Ft. Smith v. McKibben*, 41 Ark. 49, 48 Am. Rep. 19. In that case, which was a suit for an injunction to restrain the city from opening a certain alley, the court, in discussing the nature of municipalities and of the acts involved in the case at bar, said: "She [the plaintiff] claims that the action of the city was oppressive, as well as unauthorized. That the alley was never dedicated to the public, and that if it were, the right of the municipality to control it had been lost by limitation. It is convenient to consider the last question first. It is one of great importance, which has been frequently considered in other states, and with regard to which there is much conflict of authority. It may be presented thus: Is a city or town corporation, with respect to property or powers which it holds in trust for the public, bound by the statute of limitations, so as to be precluded, by lapse of time and adverse holding, from claiming to control the property or exercise the power? With regard to property or contract rights which the municipality claims for its own convenience as a corporation, there is little difficulty. Almost, if not quite, all the authorities concur in holding in such cases that it is amenable to the statute; and we think it obvious that it should be, on principle. Quoad hoc, it does not represent the sovereignty of the people, but only itself and the local interests of citizens.

"The trouble arises where the powers are held in trust, not for the members of the body corporate alone, but for the whole people who may come to the city. The most common cases are those arising with regard to the use of streets, squares, parks and commons, which have been dedicated to the public. Appellees contend that in this respect alleys do not stand upon the same ground with streets and squares; but, waiving that for the present, we will consider the question with regard to all. If municipalities are not bound by statutes of limitations with regard to these public trusts—that is, with regard to their power to keep open streets, etc.—it must be upon the maxim, 'Nullum tempus occurrit regi,' and that municipalities are the adjutants of government, and have the franchise of sleeping upon their rights; or, rather, that the public must not suffer from their neglect. But municipal corporations are not really the state, nor are their functions and powers conferred for the benefit of the whole people of the state, although incidentally they hold some trusts in the exercise of which any citizen of the state may come to be interested. It may well be doubted whether the reason of the maxim may not be strained too far in applying it to these bodies. That 'the time and attention of the sovereign must be supposed to be occupied by

the cares of government' might well have excused a king from asserting his rights, but affords no reason why the officers of a corporation should not be reasonably diligent in the discharge of the very duties they were selected to execute. Nor does it afford a reason why citizens, daily sensible of an encroachment on their common rights, should be allowed to lie dormant for many years, and then assert them to the detriment of others. The maxim should not become the instrument of wrong. The more wholesome rule for the citizen, individually, and collectively as well, is that the laws favor the vigilant only, and not the careless and slothful."

In *Re Counties etc. v. Alturas County*, 4 Idaho, 145, 95 Am. St. Rep. 53, 37 Pac. 349, it was held that municipal corporations (including counties in the term), in all matters involving mere private rights as contradistinguished from public rights, strictly so called, are subject to limitation laws to the same extent as private individuals, but, on the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws as such. The decision in the principal case (*Bannock County v. Bell*, ante, p. 140), though overruling the case of *Fremont v. Brandon*, 6 Idaho, 482, 56 Pac. 264, which held that certain limitations ran against the county, in referring to the case cited above, merely said it was not in point.

It has also been held in general terms that statutes of limitation do not run against municipal corporations as to property held or used for public or governmental purposes: *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143, 30 South. 645; *Bedford v. Willard*, 133 Ind. 562, 36 Am. St. Rep. 563, 33 N. E. 368; *Bay St. Louis v. Hancock Co.*, 80 Miss. 364, 32 South. 54. But that such statutes operate where it is not held for public use: *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867.

It was substantially held, in *Presidio Co. v. Jeff Davis Co.* (Tex. Civ.), 77 S. W. 278, that neither the doctrine of stale demand nor limitation statutes would apply to proceedings to determine the boundary line between two counties. And in *United States v. Nashville etc. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, the United States had purchased, as trustee for the Chickasaw Indians, under certain treaties with them, certain bonds of Tennessee. The court held that the right of action of the United States on the coupons of such bonds could not be barred by a statute of limitations of Tennessee, either while it held the bonds in trust, or after becoming the owner of the coupons.

4. Litigation Affecting Private Rights or Ordinary Business Transactions.—Many of the cases bearing on the phase of the subject to be treated in this section have been adverted to in the preceding section. The courts, in treating of the application of limitation statutes to cases involving public rights have often, in the same connection, stated the rule where such statutes were set up in cases in-

volving private or ordinary business rights; hence, to again comment on or quote from the cases there referred to would be but an unnecessary repetition. From the cases already referred to and those which will be referred to in the further discussion of the subject, it seems that the courts are not entirely harmonious in their views. In *Burlington v. Burlington etc. R. R. Co.*, 41 Iowa, 140, which was a suit by the city to recover certain municipal taxes, the court, in discussing the application of the statute of limitations, said: "It is argued that as the city is an instrument of the state in exercising the functions pertaining to government, it is to be regarded as the state, and the maxim, 'Nullum tempus occurrit regi,' preserves to it all rights of action given to enforce its governmental authority. The learned counsel for plaintiff admit that they are able to cite no authorities in support of their position that the maxim is applicable to the city. They concede that where actions are brought by municipal corporations to recover property, or to enforce contracts made with them in their corporate and governmental capacity, the statute may be pleaded, as where like actions are brought by natural persons. They observe, and we think accurately, that: 'The cases which hold municipal corporations are not exempt from the statute, refer to rights of property and not to public duties. . . . When the city, laying aside its sovereignty, places itself in the position of a mere contracting party and deals with the individual, not as a subject, but as a natural person, it, as we have before said, subjects itself to the laws controlling natural persons.' We think the doctrine of the quotation is not only well expressed but entirely correct." The court then held that the city taxes, which were the subject of the litigation, were debts, and that it constituted property held by the city in its proprietary character.

In *Simplot v. Chicago etc. Ry. Co.*, 16 Fed. 361, 5 McCrary, 158, the rule was expressed in the following language: "The true rule is that when a municipal corporation seeks to enforce a contract right, or some right belonging to it in a proprietary sense, or, in other words, when the corporation is seeking to enforce the private rights belonging to it, as distinguished from rights belonging to the public, then it may be defeated by force of the statute of limitations; but in all cases wherein the corporation represents the public at large, or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable. In the latter cases the courts may apply the doctrine or principle of an estoppel, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights."

As an illustration of the varied views of the courts as to these questions and the reasons which they urge in support of their views, we will quote from *United States v. McElroy*, 25 Fed. 804, and then

from *United States v. Insley*, which was the same case in the United States supreme court, where the decision of the circuit court was reversed. Both of these cases appear to have been very well considered. It seems to us, however, that the reasons given by the United States supreme court for its holding would not apply to similar suits by municipal corporations, although the reasoning might apply to a state under similar circumstances.

In *United States v. McElroy*, 25 Fed. 804, which was a suit in equity by the United States to redeem from a mortgage foreclosure, Justice Brewer, then on the circuit bench, in delivering the opinion of the court, said: "Unquestionably, if the plaintiff was a private individual, the statute of limitations would cut off all right to redeem; but it is said that the statute of limitations runs not against the government. This is unquestionably true, and it may also, for the purposes of this case, be conceded that neither the statute of limitations nor laches bar the government as to any claim for relief in a purely governmental matter; but when the government comes as a complainant into a court of equity, asserting the same rights as a private individual—a mere matter of dollars and cents, involving no questions of governmental right or duty—it seems that, although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to the effect of laches should be enforced. In the case of *United States v. Beebe*, 17 Fed. 37, 4 McCrary, 12, this rule was laid down by the circuit court of this circuit: 'Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the government becomes a party to a suit in its courts it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.'

"I think that doctrine eminently just and correct. It is especially true in a case like this. The government could not, except at its own will, be made a party to any foreclosure suit. When a complainant is, therefore, in a foreclosure suit, unable to compel the appearance of the government, or to have its rights adjusted and foreclosed, it would be cruel to hold that a party standing by its own will aloof from the power of the courts could hide its time, and after the lapse of many years, when property values have changed, when parties have acted in the faith of perfect title, come into a court of equity and say that all these proceedings go for naught so far as title is concerned, and now claim a property which by the combined efforts and action of many individuals, among whom is such complainant, has been largely increased in value. I hold, therefore, that the claim of the government is barred by its own laches, and that the demurrer must be sustained and the bill dismissed."

But Justice Blatchford, in delivering the opinion of the United States supreme court, in *United States v. Insley*, 130 U. S. 263, 9

Sup. Ct. Rep. 485, 32 L. ed. 968, which was an appeal of the case just quoted from, after referring to the decision of the circuit court, said: "This decision of the circuit court was made in December, 1885, prior to the decisions of this court in the cases of *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670, 29 L. ed. 845, *United States v. Nashville Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, and *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, 32 L. ed. 121. These cases determine that the decree in the present case must be reversed.

"In *Van Brocklin v. State of Tennessee*, 117 U. S. 158, 6 Sup. Ct. Rep. 670, 29 L. ed. 845, this court said: 'The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected,' 'to pay the debts and provide for the common defense and general welfare of the United States.'

"In the present case, the United States holds the title to the property in question, as it holds all other property, for public purposes, and not for private purposes. So holding the title and the right of possession under their deed, it holds in the same manner, and for public purposes, the incidental right of redemption. In this view the doctrine often laid down, and again enforced in *United States v. Nashville Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006, 30 L. ed. 81, applies to this case. It was there said (page 125): 'It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound: *Lindsey v. Miller*, 6 Pet. 666, 8 L. ed. 538; *United States v. Knight*, 14 Pet. 301, 315, 10 L. ed. 465; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *Fink v. O'Neil*, 106 U. S. 272, 281, 1 Sup. Ct. Rep. 325, 27 L. ed. 196.' This doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity. In *United States v. Beebe*, 127 U. S. 344, 8 Sup. Ct. Rep. 1083, 32 L. ed. 121, it was said: 'The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest is established past all controversy or doubt.' These views entirely cover the present case.

"It was suggested in the decision of the court below, as a ground for applying to the United States the doctrine of laches, that the

government was not made a party to the foreclosure suit, because it could not have been made such party except at its own will, and that it would be a hardship to the other parties to this suit to allow the government to lie by for so many years, and then come into a court of equity to assert the rights sought to be maintained in this suit. It is a sufficient answer to this view to say that the principle we have announced has long been understood to be the rule applicable to the government, and that it rests with Congress, and not with the courts, to modify or change the rule."

It was, however, held in *Bank of the United States v. McKenzie*, 2 Brock, 393, Fed. Cas. No. 927, that where a sovereign becomes a member of a trading company, it divests itself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen. So, also, in *Calloway v. Cossart*, 45 Ark. 81, the transactions of a bank which had been aided by the state, were a matter of controversy, and the questions whether limitations would apply arose. The court said: "It is obvious that all these were plain business transactions after the grant of the original franchises. The attitude of the state with regard to this property, or her rights of indemnity in it, was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its credit to the bank. When a state steps down into the arena of common business in concert, or in competition with her citizens, she goes divested of her sovereignty. The reason of the maxim 'Nullum tempus occurrit regi' no longer applies"; citing *United States Bank v. McKenzie*, 2 Brock (Chief Justice Marshall's decisions), 393, Fed. Cas. No. 927; *United States v. White*, 2 Hill, 59, 37 Am. Dec. 374; *Fields v. Wheatly*, 1 Sneed, 351; *Bank of Tennessee v. Dibrell*, 3 Sneed, 379; *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 6 L. ed. 244; *Angell on Limitations*, 6th ed., sec. 41.

In the *United States v. Buford*, 3 Pet. 12, 7 L. ed. 585, it was held that the assignment to the United States of a debt barred by the statute of limitations gives it no more validity than when in the assignor's hands. And in *United States v. White*, 2 Hill, 59, 37 Am. Dec. 374, it was held that the statute of limitations do not run against the United States, although they sue upon a note or cause of action acquired by transfer from a private person, unless the statute had begun to run before the transfer was made.

In *Shelby County v. Bickford*, 102 Tenn. 395, 52 S. W. 772, it was held that where a county sues its grantors on a covenant against encumbrances, there having been county taxes due at the time of the conveyance, the suit is not brought in a sovereign capacity, and hence it is subject to the ordinary limitation statutes. So, also, in *Johnson v. Llano County*, 15 Tex. Civ. 421, 39 S. W. 995, it was held that a county suing to recover land not devoted to public use is not exempt from the operation of the statutes of limitation.

Theoretically, the rule that statutes of limitation do not run against governmental bodies when asserting a public right or protecting property held for public use, and that such statutes do run against such bodies when asserting private rights or enforcing rights arising from out of ordinary business transactions, is sound. The rule is supported by the weight of authority, although there are some cases which seem to hold that the pecuniary interests of the United States are matters of sovereignty. The difficulty of any rule in regard to the subject lies in its application to the varied circumstances of each particular case. There are, of course, many circumstances under which it would be readily conceded that the governmental body is acting strictly in a sovereign capacity, but, on the other hand, there are many other circumstances when it seems to us that it is extremely doubtful whether the governmental body is acting in a strictly sovereign capacity in attempting to enforce alleged property rights. It would seem that when all the people of the United States or of the state (both of which seem to be recognized as representing the sovereignty) are interested in the subject matter of the litigation, that there is no question about the maxim applying, but that when only a portion of the people of the state—for instance, that part of the people residing in some minor subdivision of the state, such as a county or municipal corporation—are the sole parties interested in the subject matter of the litigation that then the maxim does not apply. It seems to be held by some of the courts that in so far as a municipal corporation acts merely for the benefit of the people within the limits of the municipality, its actions are similar to those of a private corporation acting in the interest of its stockholders, and that as to such actions, the municipality is bound to use the same degree of vigilance as a private corporation, but that when the municipality acts in regard to some matter or thing in which all the people of the state are interested, though, perhaps, in a lesser degree than the people within the limits of the municipality, it then acts as the representative of the sovereignty and the maxim applies. The courts, however, apparently do not apply these principles uniformly. It is very often quite difficult to determine when the subject matter affects the general public, and when it affects only the locality, and besides the application of the maxim strictly often operates very harshly on individual interests. But many of the courts, as we have seen, apply the doctrine of equitable estoppel where the strict application of the maxim would work a hardship upon innocent individuals. The application of the maxim is also limited to a large extent by statutory provisions, and many of the apparently inconsistent decisions may be reconciled with the principles set forth by the weight of authority by considering them in the light of the statutory provisions in regard to the application of limitations in the jurisdiction where the decision was rendered.

a. Actions or Proceedings in Which Application of Maxim Was Sought.

1. **In General.**—Inasmuch as the main purpose of this note has been merely to discuss the general principles regarding the maxim and its application, we shall not comment on or discuss the cases which we shall cite, wherein it was sought, successfully or unsuccessfully, to apply the maxim. In many instances, the question has been one of construction as to whether a particular statute of limitation was sufficiently expressive to overcome the exemption afforded by the maxim. Hence, we shall merely call attention to the cases, and indicate in a general way the subject matter toward which it was sought to apply the maxim.

2. **Recovery of Property or Funds of the Government.**—The question was raised in a suit for the recovery of funds belonging to the United States and wrongfully obtained by the defendant in *United States v. Mitchell*, 26 Fed. 607; *Pooler v. United States*, 127 Fed. 519. The recovery of funds or fees alleged to have been illegally retained by an official was the subject matter in *People v. Van Ness*, 76 Cal. 121, 18 Pac. 139; *People v. Melono*, 73 Cal. 574, 15 Pac. 294; *Pike County v. Cadwell*, 78 Ill. App. 201; *Kemp v. Commonwealth*, 1 Hen. & M. 85. And in *Terre Haute etc. R. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401, the subject of litigation was the recovery of certain surplus profits due the state from a railway company created by a special statute. The cases in which the adverse possession of public property was involved will be found in the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479, while the cases in which the right to acquire title by adverse possession to lands particularly devoted to a public use will be found in the monographic note to *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 775. The recovery of the proceeds from the sale of lands held for the benefit of the school fund or of moneys belonging to the school fund were the questions in *State v. Burk*, 63 Ark. 56, 37 S. W. 406; *Trustees v. Arnold*, 58 Ill. App. 103; *Board v. State*, 106 Ind. 270, 6 N. E. 623; *Des Moines County v. Harker*, 34 Iowa, 84; *Kellogg v. Decatur County*, 38 Iowa, 524; *State v. Farrell*, 83 Iowa, 661, 49 N. W. 1038; *Parish Board v. Shreveport*, 47 La. Ann. 1310, 17 South. 823; *Trustees etc. v. Campbell*, 16 Ohio St. 11; *State v. Finn*, 102 Mo. 222, 14 S. W. 984; *State v. Crumb*, 157 Mo. 545, 57 S. W. 1030.

3. **Recovery of Taxes, Assessments, Forfeitures and Penalties.**—In *State v. City of Columbia* (Tenn. Ch.), 52 S. W. 511, it was sought to recover certain state taxes collected by the municipality, and in *Stewart's Estate*, 147 Pa. St. 383, 23 Atl. 599, the subject of the litigation was the recovery of a collateral inheritance tax; while in *Commissioners v. Buckner*, 48 Fed. 533, a city sought to recover taxes illegally collected by the United States. Suits for the recovery of general taxes generally involve the construction of stat-

utes of limitation. The application of the maxim is, however, sometimes raised: See, generally, on the question, *San Francisco v. Luning*, 73 Cal. 610, 15 Pac. 311; *Bell v. Stevens*, 116 Iowa, 451, 90 N. W. 87; *Thornburg v. Cardell*, 123 Iowa, 313, 95 N. W. 239; *Reed v. Creditors*, 39 La. Ann. 115, 1 South. 784; *Hood v. New Orleans*, 49 La. Ann. 1461, 22 South. 401; *Brown County v. Winona etc. Co.*, 38 Minn. 397, 37 N. W. 949; *State v. Piland*, 81 Mo. 519; *Board of Commissioners v. Story*, 26 Mont. 517, 69 Pac. 56; *Hoover v. Engles*, 63 Neb. 688, 88 N. W. 869; *Hagerman v. Territory (N. Mex.)*, 66 Pac. 526; *State v. Yellow Jacket etc. Co.*, 14 Nev. 220; *City of Wilmington v. Cronly*, 122 N. C. 383, 388, 30 S. E. 9; *Greenlaw v. Dallas (Tex. Civ.)*, 75 S. W. 812; *City etc. of San Francisco v. Jones*, 20 Fed. 188. See, also, the monographic note to *Richards v. Commissioners of Clay Co.*, 42 Am. St. Rep. 655, on the recovery of personal judgments for taxes. As bearing on the distinction between special assessments and ordinary taxation, see *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451. As bearing on the recovery of city taxes and assessments in connection with this general subject, see *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290; *Burlington v. Burlington etc. Co.*, 41 Iowa, 134; *Lexington v. Crosthwaite (Ky.)*, 78 S. W. 1130; *Miramón v. New Orleans*, 52 La. Ann. 1623, 28 South. 107; *Memphis v. Looney*, 68 Tenn. (9 Baxt.) 130; *Mellinger v. Houston*, 68 Tex. 36, 3 S. W. 249; *Hogan v. Ingle*, 2 Cranch C. C. 352, Fed. Cas. No. 6583. As bearing on the recovery of assessments for the construction of a township ditch, see *Hartman v. Hunter*, 56 Ohio St. 175, 46 N. E. 577. As to actions for the recovery of penalties and forfeitures, see *People v. Strauss*, 97 Ill. App. 47; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *State v. Halter*, 149 Ind. 292, 47 N. E. 665; *United States v. One Dark Bay Horse*, 130 Fed. 240.

4. **Collection of Debts in General.**—In regard to the collection of ordinary debts due a governmental body, see *Board v. Loda*, 9 Ind. App. 369, 36 N. E. 772; *United States v. White*, 2 Hill, 59, 37 Am. Dec. 374; *Commonwealth v. Hutchinson*, 10 Pa. St. 466. The subject matter in *San Luis Obispo Co. v. Gage*, 139 Cal. 393, 73 Pac. 174, was a claim of a county against the state for the support of certain orphans; and in *State v. Dunbar's Estate*, 99 Mich. 99, 57 N. W. 1103, the suit was for the recovery of money expended for the maintenance of an insane person at an insane asylum.

5. **Suits on Official or Other Bonds.**—The recovery on official bonds is generally regulated by statute. The applicability of statutes of limitations to bonds of that character was discussed in *Ware v. Greene*, 37 Ala. 494; *San Luis Obispo Co. v. Farnum*, 108 Cal. 567, 41 Pac. 447; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *San Diego County v. Dauer*, 131 Cal. 199, 63 Pac. 338; *Ramsey's Estate v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; *Ware v. State*, 74 Ind. 181; *State v. Dyer*, 17 Iowa, 223; *State v. Henderson*, 40 Iowa, 242; *Board*

v. Van Slyck, 52 Kan. 622, 35 Pac. 299; Clements v. Blossat, 26 La. Ann. 243; Furlong v. State, 58 Miss. 717; State v. Pratte, 8 Mo. 286, 40 Am. Dec. 140; United States v. Rand, 4 Saw. 272, Fed. Cas. No. 16,116. In Straus v. Commonwealth, 62 Ky. 149, a bail bond was the subject of the litigation, while in Link v. Murphy, 2 Wils. Civ. Cas. (Tex.), sec. 13, the suit was based on a bond relative to the hire of a county convict.

6. **Rescission of Fraudulent Land Patent.**—In State v. Burnett (Tex. Civ.), 59 S. W. 599, it was held that limitation statutes do not run against the right of the state to set aside a land patent obtained by fraud. See, also, monographic note to Schneider v. Hutchinson, 76 Am. St. Rep. 479.

7. **Restraint of Public Nuisance.**—The authorities relative to the right to continue a public nuisance by reason of prescription were discussed in the monographic note to Mississippi Mills Co. v. Smith, 30 Am. St. Rep. 557. The subject was also adverted to in Reed v. Birmingham, 92 Ala. 339, 9 South. 161; Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088.

8. **Escheat Proceedings.**—The general subject of limitations as applied to the proceeding in escheat was discussed in the following cases: Male High School v. Auditor, 80 Ky. 336; Hepburn's Case, 3 Bland, 115; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; In re Bousquet's Estate, 206 Pa. St. 534, 56 Atl. 60; Harlock v. Jackson, 3 Brev. (S. C.) 254; French v. Commonwealth, 5 Leigh, 512, 27 Am. Dec. 613.

9. **Quo Warranto Proceedings.**—The general effect of the statute of limitations and of the maxim, "Nullum tempus occurrit regi," is treated in the monographic note to McPhail v. People, 52 Am. St. Rep. 312. We will, however, refer to some of the cases decided since that time. The distinction in applying statutes of limitation to quo warranto proceedings as dependent upon the public or private purposes to be attained by the proceeding was discussed in Catlett v. People, 151 Ill. 24, 37 N. E. 855. The general subject was also treated in State v. Wofford, 90 Tex. 514, 39 S. W. 921. The subject of laches in connection with quo warranto proceedings to test the legality of the organization of a drainage district was treated in People v. Schnepf, 179 Ill. 305, 53 N. E. 632; People v. Gary, 196 Ill. 310, 63 N. E. 749. The statute of limitations as applied to an information in the nature of quo warranto to try title to an office, was an issue in Place v. People, 87 Ill. App. 527, 192 Ill. 160, 61 N. E. 354, while the subject as applied to boards was treated in State v. Buckley, 60 Ohio St. 273, 54 N. E. 272. The subject of laches as applied to quo warranto proceedings to oust a city from its franchise was discussed in Soule v. People, 205 Ill. 618, 69 N. E. 22; State v. Town of Mansfield, 99 Mo. App. 146, 72 S. W. 471. Quo warranto proceedings on the relation of the inhabitants of a

village to oust its trustees, was the subject of *People v. Harker*, 197 Ill. 409, 64 N. E. 253. Quo warranto to inquire into an alleged usurpation by others of powers granted to an incorporated town was the issue in *State v. Wofford*, 90 Tex. 514, 39 S. W. 921. The effect of laches on quo warranto proceedings to forfeit the franchise of a corporation, was discussed in *Kellogg v. Union Co.*, 12 Conn. 7; *People v. Pullman Palace Car Co.*, 175 Ill. 125, 51 N. E. 664; *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *People v. Oakland County Bank*, 1 Doug. (Mich.) 282; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521, 94 Am. Dec. 123. For a general discussion of the subject, see the monographic note to *State v. Atchison etc. R. Co.*, 8 Am. St. Rep. 179.

ANDERSON v. CREAMERY PACKAGE MANUFACTURING COMPANY.

[8 Idaho, 200, 67 Pac. 493.]

USURY—Corrupt Intent.—A contract for interest at higher than the legal rate both before and after judgment, without a corrupt intent on the part of the lender to exact an unlawful rate of interest, is not usurious. (p. 193.)

USURY is Matter of Intention, and to avoid a contract it must appear that the lender knew the facts, and acted with a view of evading the law. (p. 193.)

FIXTURES—Mortgage Lien.—If machinery is purchased and placed for use in a permanent building under a contract that it shall remain the property of the seller, or, after such machinery is placed in the building, a chattel mortgage is given by the purchaser to the seller on such machinery, a prior real estate mortgage on the building given by such purchaser is not a prior lien on such machinery so as to estop the chattel mortgagee from foreclosing his mortgage. (p. 194.)

J. A. Bagley, for the appellant.

A. Budge, for the respondent.

208 STOCKSLAGER, J. This case comes here for review from three judgments rendered by the district court of Bear Lake county. On the twenty-first day of June, 1899, C. J. Anderson and Margaret Anderson, defendants, executed to plaintiff, John A. Anderson, a promissory note, to wit: "Four years after date, for value received, we, or either of us, promise to pay to John A. Anderson \$3,100, negotiable and payable at the Manufacturers' National Bank of Racine, Wisconsin, in United States gold coin, with interest at the rate of ten per cent per

annum from date until paid, both before and after judgment; and, if suit be instituted for the collection of this note, we agree to pay a reasonable attorney's fee. Interest payable yearly."

On the eleventh day of October, 1898, the same parties executed and delivered their promissory note payable to Mattie Vass, to wit: "Two years after date, for value received, we, or either of us, promise to pay to Mattie Vass, or order, \$400, negotiable and payable at the Manufacturers' Bank of Racine, Wisconsin, in United States gold coin with interest at the ²⁰⁴ rate of ten per cent per annum from date until paid, both before and after judgment, and, if suit be instituted for the collection of this note, agree to pay a reasonable attorney's fee. Interest payable yearly." Mortgages were executed by C. J. Anderson and his wife, Margaret Anderson, to secure the payment of these notes upon the Anderson Creamery property in Bear Lake county, recorded, and delivered to John A. Anderson and Mattie Vass. The mortgages covered the creamery machinery fixtures and land. Mattie Vass assigned her note and mortgage to John A. Anderson before maturity, and on the twenty-eighth day of January, 1901, he brings suit to foreclose both mortgages.

On April 14, 1900, C. J. Anderson and Margaret Anderson executed and delivered their promissory note to the Creamery Package Manufacturing Company, a corporation, to wit: "For value received, we jointly and severally promise to pay to the order of Creamery Package Manufacturing Company, a corporation, the sum of \$969, together with interest thereon at the rate of eight per cent per annum from date until paid, payable in installments as follows, to wit: Twenty-five dollars one month from date, twenty-five dollars two months from date, fifty dollars three months from date, and the sum of one hundred dollars on the fourteenth day of each and every month thereafter until the full amount of this note, together with the interest thereon, has been fully paid; and, if suit be instituted for the collection of this note, we, or either of us, promise to pay a reasonable attorney's fee."

On the same date a mortgage was executed and delivered by the Andersons to the Creamery Package Manufacturing Company to secure the payment of this note on the Anderson Creamery property in Bear Lake county, and at the same time a chattel mortgage was executed and delivered by the Andersons to the Creamery Package Manufacturing Company with property described, to wit: "One 36x8 15 H. P. boiler, complete, with

all fittings, including 38, 16 stack and guy wire; one four hundred-gallon cheese vat; one four hundred-gallon milk rec. vat (gal.); one 400-gallon cream vat; one 60-gallon weigh can with three P.; one two-pound butter print, with 12 extra ²⁰⁵ trays; one 14½ Helmer improved cheese press; twenty 14i, 2x6 gang press hoops and followers; two No. 1 Ideal rotary pumps; two No. 15 Goshier tanks; seven doz. ½ pint sample jars; one Canby sulph. acid; one Ideal test measure; one doz. 15 day milk sheets; two doz. jars; five gal. Housen's ch. color; ten gal. Renets; one large packet ferment; one De Haven C. B. bax hacks; one set 3x4 figures and letters; one revolving stencil; one Sturvil brush; one curd rake; one curd scrape; one 10x20 hard curd knife; one 10x20 peop curd knife; one 2s curd pail; one belt 14x½ bandaged; ten yards heavy press cloth; one bolt 4 oz. cheese cloth; ten yards heavy press cloth; 25 feet 4-ply rubber belt; 64 feet 2½ 2-ply rubber belt; 100 feet ¾ cut lace; 10 feet 3x4 4-ply hd. rubber suction hose; 150 feet ¾ gal. pipe; 6 feet ¾ gal. els; 6¾ gal. tees; 6¾ globe valves; 6¾ to ½ gal. reducers."

On the fifth day of February, 1901, an action was commenced in the district court of Bear Lake county to foreclose these two mortgages. On the twenty-fifth day of February, 1901, Honorable J. C. Rich, the district judge, caused to be made and entered of record the following order: "It is agreed by and between counsel for all parties wherein John Minnig is plaintiff and C. J. Anderson, defendant, and John A. Anderson is plaintiff and C. J. Anderson et al. are defendants, and also where Creamery Package Manufacturing Company is plaintiff and C. J. Anderson and Margaret Anderson are defendants, that the same may be consolidated and tried together, each of the parties answering the complaint of the others; and the same is hereby ordered by the court." On the twenty-eighth day of February, 1901, the Creamery Package Manufacturing Company answered the complaint of John A. Anderson, and, after alleging its corporate existence under and by virtue of the laws of the state of Missouri, and alleging its right of recovery by virtue of its mortgages, pleads that the note set out in plaintiff's first cause of action "is usurious and void as to the said corporation, and provides for an illegal rate of interest"; that said note, by its terms, is not due, and will not be due before the twenty-first day of June, 1903; hence prematurely brought, ²⁰⁰ and cannot be maintained. Answering the second cause of action, usury is alleged. Then follows an allegation that the

lien of plaintiff, if he have any, is "subordinate to and subject to the lien of the said corporation." J. A. Anderson answers the complaint of the Creamery Package Manufacturing Company, averring that the articles described in the chattel mortgage are affixed and appurtenant to the building and machinery known as the Anderson Creamery, and that all of said articles are covered by each of the mortgages described in his complaint, and that said mortgages are a lien and encumbrance on said fixtures and appurtenances, and that plaintiff's two mortgages are a prior lien and encumbrance upon said goods and chattels. In the decree it is shown that "findings of fact and conclusions of law were expressly waived by the respective parties in writing."

Folios 71-74 of the transcript disclose the court's decision as follows: "1. That Anderson note for \$3,100 is not due, and action dismissed as to said cause of action. 2. That Anderson note for \$400 and mortgage is prior to and has preference over Package Manufacturing Company note and mortgage, and that judgment be entered of foreclosure in accordance with terms of contract for amount found due, principal, with no interest or attorney's fees, by reason of usurious contract in note, and that usual judgment in favor of school fund be entered against defendant. The court finds there was no fraud or want of consideration. 3. That Package Manufacturing Company have judgment for foreclosure of real and personal mortgage for amount found due on contract, both principal and interest, with \$100 attorney's fees and costs. The court also finds the mortgaged articles mentioned in chattel mortgage are not fixtures, and can be removed without injury to the building. 4. The judgment is that said mortgaged premises be sold according to law, and after payment of costs of sale, the foregoing judgments be paid in the order named." Then follow decrees conforming to the findings or order of the court as above set out. Appellant, in his brief, relies upon these alleged errors: 1. That the notes are valid, and the "before and after judgment" ²⁰⁷ clauses in the notes do not make them usurious. 2. If this is a usurious clause, it found its way into these two notes by mistake. There was no corrupt agreement between the parties, and no intention on the part of either party to pay or receive usury, and therefore the penalty of the statute should not be enforced in this case against the plaintiff. 3. The machinery purchased and placed in the creamery for permanent use therein became a fixture, and was covered by the \$400 and \$3,100 mortgages.

In support of his contention that these notes were not usurious, counsel for appellant calls our attention to section 1264 of the Revised Statutes of Idaho, to wit: "Parties may agree in writing for the payment of any rate of interest on money due or to become due, on any contract not to exceed the sum of one and one-half per cent per month; any judgment rendered on such contract bears interest at the rate of ten per cent per annum until satisfied."

By the Session Laws of Idaho of 1899, at page 316, we find the following amendment: "Parties may agree in writing for the payment of any rate of interest on money due, or to become due, on any contract not to exceed the sum of twelve per cent per annum; any judgment rendered on said contract shall bear interest at the rate of seven per cent per annum until satisfied." Section 1263 of the Revised Statutes provides that "when there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of ten cents on the hundred by the year, on money due on the judgment of any competent court or tribunal." By the Session Laws of 1899 (page 316) we find this section amended so as to read: "When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of seven cents on the hundred by the year on money due on the judgment of any competent court or tribunal."

The first question presented for our consideration is whether the two notes sued on were usurious. By the record it is shown that C. J. Anderson contracted to borrow money of John A. Anderson and Mattie Vass, both residents of Wisconsin; that he was to secure them with mortgages on his creamery property ²⁰⁸ in Bear Lake county. He was also authorized by both parties to have the notes and mortgages prepared, signed, recorded, and forwarded to them in Wisconsin. The rate of interest agreed upon was ten per cent per annum. In pursuance of such agreement, C. J. Anderson went to the law office of Alfred Budge, had the notes and mortgages prepared by Mr. Budge. They were recorded, and forwarded as directed. The money was furnished by John A. Anderson and Mattie Vass for C. J. Anderson, and they had nothing whatever to do with the execution of the notes and mortgages, and, so far as the record shows, never knew that the question of usury would or could arise. Neither does the record disclose that C. J. Anderson, either for himself or for John A. Anderson and Mattie Vass (if he was acting for them), intended to enter into a usurious con-

tract in the execution and delivery of the notes and mortgages sued on; hence, if the notes appear to be usurious, it is not shown that there was any corrupt agreement between the parties to pay or receive a rate of interest not allowed by our statutes. In *Washington etc. Investment Assn. v. Stanley*, 38 Or. 319, 63 Pac. 495, 58 L. R. A. 816, it is said: "But notwithstanding the contract appears to be usurious on its face, and the natural inference to be drawn therefrom is that the parties intended the result of their own acts, yet there is another element which must attend the practice of usury. It must be with a corrupt intent, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law. But where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken, it has been held that the penalties of usury would not be enforced": *Thompson v. Jones*, 1 Stew. 556; 27 Am. & Eng. Ency. of Law, 925; *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89; *Burwell v. Burgwyn*, 100 N. C. 389, 6 S. E. 409; *Tyler on Usury*, 110. In *Fay v. Lovejoy*, 20 Wis. 407, it is said: "Usury is a matter of intention, and to avoid a contract on that ground it must appear that the lender knew the facts, and acted with a view of evading the law": See *Otto v. Durege*, 14 Wis. 574, and cases cited; *Bank v. Waggener*, 9 Pet. 378, 9 L. ed. 163. Under ²⁰⁰ the authorities above cited, can it be said that John A. Anderson and Mattie Vass knowingly and corruptly entered into contracts—the notes and mortgages—with the intent to collect a rate of interest that would be usury under our statute? We think not.

The next question presented by the record is the cause of action arising on the chattel mortgage given by C. J. Anderson and wife to the Creamery Package Manufacturing Company. It is shown that after the execution and delivery of the notes and mortgages on the creamery property of C. J. Anderson by said Anderson and wife to John A. Anderson and Mattie Vass, C. J. Anderson bought certain machinery of the Creamery Package Manufacturing Company, to be placed in said creamery building; that such machinery was placed in said building, and used by C. J. Anderson. C. J. Anderson and wife executed and delivered their note to the Creamery Package Manufacturing Company, and at the same time executed and delivered their chattel mortgage to said company covering said property. It is also shown that at the same time C. J.

Anderson and wife executed and delivered to said company their real estate mortgage as additional security for the payment of the obligation sued on, said mortgage covering the creamery property of said C. J. Anderson. At the trial, evidence was offered on behalf of the Creamery Package Manufacturing Company for the purpose of showing that the sale of the property covered by the chattel mortgage was a conditional one—that the property was to remain the property of the Creamery Package Manufacturing Company until paid for—and this condition existed up to the time of the execution and delivery of the chattel mortgage. An objection was interposed to the admission of this evidence on the ground that it was immaterial, which was sustained by the court. It would seem from the offer and the objection that the property had been treated as personal in its character by the Creamery Package Manufacturing Company, as well as Mr. C. J. Anderson, who was the witness by whom it was sought to prove such contract of sale, and, we think, was a material issue in the case in determining the character of the property, whether personal or a part of the realty, and hence, whether ²¹⁰ it had become a fixture. From these facts we conclude that the John A. Anderson mortgage and the Mattie Vass mortgage were prior liens upon the real estate of C. J. Anderson, and that the said mortgages did not cover the machinery placed in said building bought from the Creamery Package Manufacturing Company; that said Creamery Package Manufacturing Company is entitled to have its chattel mortgage foreclosed, as found by the trial court.

The only error we find in the record is the judgment of the trial court finding that the John A. Anderson note and the Mattie Vass note were usurious. The judgment of the trial court is reversed in this particular, and remanded for further proceedings in harmony with the views herein expressed.

Quarles, C. J., and Sullivan, J., concur.

The Necessary Elements of a Usurious Contract are discussed in the monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178-202. The intent of the parties, as an essential element, is considered at pages 179-182 of this note.

When and Against Whom Fixtures may, by agreement, retain the character of personal property is discussed in the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 877-901. At pages 888-892 of this note, the subject is considered in relation to prior mortgagees of the realty. See, also, *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598.

HAVENS v. STILES.

[8 Idaho, 250, 67 Pac. 919.]

LEGAL HOLIDAYS.—Ministerial Acts by public officers may properly be performed on legal holidays, in the absence of express statutory prohibition, and statutes prohibiting judicial acts on such days do not apply to such as are merely ministerial. (p. 196.)

LEGAL HOLIDAYS.—Issuance of summons by a clerk of court on Sunday on a complaint filed on that day is merely a ministerial act, and not within the inhibition of a statute prohibiting the transaction of judicial acts on legal holidays; summons so issued is valid. (p. 200.)

L. L. Feltham, for the appellant.

J. C. Rice, for the respondent.

²⁵¹ **STOCKSLAGER, J.** There are two questions involved in this appeal: 1. If the clerk of the district court voluntarily receives and files a complaint in a civil action on Sunday, and said action was not commenced or instituted for the purpose of obtaining an order of arrest, writ of attachment, execution, injunction, or writ of prohibition, and not being a proceeding to recover possession of personal property, is it prohibited by section 3866 of the Revised Statutes? 2. Is the filing of such complaint and the issue of summons thereon a ministerial or judicial act?

It is provided by said section 3866 that: "No court can be opened, nor can any judicial business be transacted on Sunday . . . except for the following purposes: 1. To give, upon their request, instructions to a jury when deliberating on their verdict; 2. To receive a verdict or discharge a jury; 3. For the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature; provided, that in civil causes orders of arrest may be made and executed, writs of attachments, executions, injunctions, and writs of prohibition may be issued and served. Proceedings to recover possession of personal property may be had, and suits for the purpose of ²⁶² obtaining any such writs and proceedings may be instituted on any day." It is obvious from the foregoing statutory provision that the clerk of the court could not be required to perform any service on Sunday, except wherein it is provided that certain writs shall issue on that day, or any legal holiday. But if he does voluntarily receive and file the complaint, and issue the summons, are they necessarily void? We will con-

sider this question first. In *Re Worthington*, 7 Biss. 455, Fed. Cas. No. 18,051, the official syllabus says: "The act of the circuit clerk in filing the docket transcript of a judgment is a ministerial act, and not void, though done on a nonjudicial day; and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor, the same as if done on any other day." The opinion of the court is in harmony with the syllabus. Ministerial acts may properly be performed on legal holidays, in the absence of express statutory provisions, and statutes prohibiting judicial acts do not apply to such as are merely ministerial: 20 Ency. of Pl. & Pr. 1205. In the same volume, at page 1197, it is said: "While at common law, as has been seen, no judicial act could be done on Sunday, the authorities are practically unanimous that mere ministerial acts could be performed on that day, and this would seem to be the rule at the present time in the absence of any prohibitory statute." In *Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122, it is said: "As there is neither a statute nor a rule of the common law prohibiting the sale of property for taxes on Christmas Day, we cannot hold that a sale made on that day is void, however much we may doubt the wisdom and propriety of making sales on that day." *Kiger v. Coats*, 18 Ind. 153, 81 Am. Dec. 351, holds that the giving of notice of an award on Sunday is valid, it not being an act of common labor, not a judicial act, nor one specially prohibited by any statute, and being a mere ministerial act connected with a judicial proceeding. In *Hanover Fire Ins. Co. v. Shrader*, 89 Tex. 35, 59 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498, an application for a writ of error was received by the clerk on Sunday. He, being doubtful as to his power to file it, merely noted the fact and date of its receipt, and upon the next day marked it "Filed." The ²⁵³ court, in passing upon the question, says: "We conclude that the application was lawfully filed on Sunday, and that the clerk's indorsement is evidence of the fact of its filing, and therefore that we have jurisdiction of the application." Again, in *Clough v. Shepherd*, 31 N. H. 490: "It is contended that it is illegal at common law to make any writ, or to deliver it to an officer for service on Sunday. In *Mackalley's Case*, 9 Coke, 66, it was decided that no judicial act ought to be done on Sunday; but ministerial acts may be lawfully executed on that day; and this decision is recognized as the law in *Waite v. Hundred of Stoke*, Cro. Jac. 496 (Com.

Dig. 'Temps,' B, 3), and in *Swann v. Broome*, 3 Burr. 1595, *Johnson v. Day*, 17 Pick. 106, and *Frost v. Hull*, 4 N. H. 153. The award of judicial writ is a judicial act, and void if done on Sunday: Com. Dig. 'Temps,' B, 3. But the issuing of original process (which is the present case) is merely ministerial: Com. Dig. 'Temps,' B, 3. Thus, in *Waite v. Hundred of Stoke*, Cro. Jac. 496, it is said by Croke J.: 'An original writ or patent bearing teste upon the Sunday is good enough, for the chancellor may seal writs or patents upon any day.' And see *Johnson v. Day*, 17 Pick. 109, and *Bedoe v. Alpe*, W. Jones, 156, there cited." In *People v. Bush*, 40 Cal. 344, the syllabus says: "The performance of a ministerial act by a judicial officer does not constitute the act itself a judicial proceeding." In *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633, it is said the clerk only acts ministerially in issuing the process for attachment. This court, in *Glendenning v. McNutt*, 1 Idaho, 592, said: "The only remaining question is, Was the appointment of Glendenning made on a nonjudicial day? If such was the case, there would be no question but that it would be valid. The letters appear to have been issued December 25, 1871, and the court refused the introduction of any further evidence upon the subject of the appointment. Had the court allowed the introduction of the probate court record, it would have shown that the administrator was not appointed on Christmas, but on the day following: The act of appointing was a judicial act; the act of issuing letters merely ministerial. The state does not prohibit a ministerial act on a nonjudicial day, but only judicial acts." In ²⁵⁴ *Weil v. Geier*, 61 Wis. 414, 21 N. W. 246, it is held that "the statute providing that no court shall be opened or transact any business on any legal holiday does not prohibit a justice of the peace from issuing a summons on such a holiday, that being a purely ministerial act." In *Glenn v. Eddy*, 51 N. J. L. 256, 257, 14 Am. St. Rep. 684, 17 Atl. 145, we find the following language used by the court: "The history of the common law and of legislation with respect to Sunday clearly indicates that it owes its exceptional position to a general sense of its sacred character as a holy day. To no other day—although many account other days holy—has a like distinction been accorded. When we compare the course of the common law and legislation respecting Sunday with the statute now before us, a different treatment is observable. Although some of the days named are accounted holy by many,

while others are national anniversaries, or days when public duties are enjoined on citizens, yet there has been enacted no prohibition against the pursuit of any business or pleasure. There is no express prohibition against the service of the process of the courts. The direct prohibitions of the statute are aimed at only two things, viz.: (1) Compulsion to labor, and (2) the holding of courts on the days specified." In *Whipple v. Hill*, 36 Neb. 724, 38 Am. St. Rep. 742, 55 N. W. 227, 20 L. R. A. 313—a very instructive decision—a statute very similar to ours is construed. The opinion says: "By section 9, chapter 41 of the Compiled Statutes, it is provided that the first Monday in the month of September in each year shall hereafter be known as 'Labor Day,' and shall be deemed a public holiday, in like manner and to the same extent as holidays provided for in section eight (8) of chapter forty-one (41) of the Compiled Statutes of 1887. A reference to the calendar will disclose that the first day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor Day is based upon section 38, chapter 19 of the Compiled Statutes, which declares that: 'No court can be opened, nor can any judicial business be transacted on Sunday or any legal holiday except: ²⁵⁵ 1. To give instructions to a jury then deliberating on their verdict; 2. To receive a verdict or discharge a jury; 3. To exercise the powers of a single magistrate in a criminal proceeding; 4. To grant or refuse temporary injunction or restraining order.' The legislature, by the section quoted, has prohibited the courts of the state from being opened, and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday. It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which, in their nature, are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond the plain import of the words used. Had the legislature intended to debar the courts or court officers from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such

days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. 'It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids.' This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process such as a summons, execution, or writ of attachment is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid although done on a legal holiday." The opinion cites with approval *Glenn v. Eddy*, 51 N. J. L. 255, 14 Am. St. Rep. 684, 17 Atl. 145; *Kinney v. Emery*, 37 N. J. Eq. 339; *In re Worthington*, 7 Biss. 455, Fed. Cas. No. 18,051; *Weil v. Geier*, 61 Wis. 414, 21 N. W. 246; *Smith v. Ihling*, 47 Mich. 614, 11 N. W. 408; *Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122; *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857, 21 Pac. 874. Our attention has been called to 5 American and English Encyclopedia of Law, first edition, page 85, which says: "Dies Non. This is an abbreviation of the phrase 'dies ²⁵⁶ non juridicus,' universally used to denote nonjudicial days—days during which the courts do not transact any business; as Sunday, or the legal holidays." In *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798—a Montana case, under, we apprehend, a statute similar to our own—it is held that a summons cannot be legally served on Sunday; that the service of a summons is not a judicial act, but that under the statute such service cannot be made on Sunday. *Schwed v. Hartwitz*, 23 Colo. 187, 58 Am. St. Rep. 221, 47 Pac. 295, holds that "a notice of a tax sale is in the nature of a service of a process, and is void when published only in a Sunday newspaper, where the statute does not authorize service on Sunday." The opinion says: "Plaintiff, to support her title, relied upon a certain tax sale. The notice of this sale was published only in a Sunday edition of the 'Herald-Democrat,' a daily newspaper published in the city of Leadville. The statute provides that 'the treasurer shall give notice of the sale of real property by the publication thereof once a week in a newspaper published in this county,' etc. . . . The district court decided that the publication in a Sunday edition only was not legal notice, and that all proceedings thereunder were without force or effect. The publication of the notice of a tax sale is in the nature of the service of process. It will not be contended that, outside of a few cases specifically provided for by statute, service of process on Sun-

day in a civil action would be valid in this state, and the rule that tax sales are invalid if made upon a notice published only in a Sunday paper is too well settled to be now open to controversy."

We were not favored with a brief of respondent in this case, but have carefully examined the authorities to which our attention has been called, and have quoted liberally from all those bearing directly on the issues involved in the case. It seems to be almost universally held by the courts, with statutes similar to our own, that filing a complaint and issuing a summons thereon is a ministerial, and not a judicial, act; hence not prohibited by statute. The Montana case is in harmony with this conclusion, and holds directly that such acts of the court officers are ministerial, but that they are prohibited by the statute ²⁵⁷ of that state. If their statute is similar to ours, we cannot follow that decision. We are clearly of the opinion that under the provisions of our statute court officers are not prohibited from performing such acts as are merely ministerial on a legal holiday. We think the lower court was in error in sustaining respondent's motion to strike appellant's complaint from the files, and in quashing the summons issued thereon.

Case reversed, and cause remanded for further proceedings in harmony with this opinion, with costs to appellant.

Quarles, C. J., and Sullivan, J., concur.

Service of Summons on Sunday is not a nullity, though it is regarded as voidable in *Burke v. Interstate Sav. etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879. The fact that a search-warrant is issued on Sunday is held not to invalidate it in *State v. Conwell*, 96 Me. 172, 90 Am. St. Rep. 333, 51 Atl. 873. And a writ of attachment issued on Sunday is not void: *Whipple v. Hill*, 36 Neb. 720, 38 Am. St. Rep. 742, 55 N. W. 227, 20 L. R. A. 313. But see the note to *Coleman v. Henderson*, 12 Am. Dec. 290. An application for a writ of error may be received and filed on Sunday: *Hanover Fire Ins. Co. v. Shrader*, 89 Tex. 35, 59 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112, 30 L. R. A. 498. But the publication of a notice of a tax sale in a Sunday paper has been held void: *Schwed v. Hartwitz*, 23 Colo. 187, 58 Am. St. Rep. 221, 47 Pac. 295.

PIONEER IRRIGATION DISTRICT v. BRADLEY.

[8 Idaho, 310, 68 Pac. 295.]

CONSTITUTIONAL LAW—Title of Act.—If the title to an act indicates, and the act itself actually embraces, two different objects, diverse in their nature and having no necessary connection, when the constitution says each statute shall embrace but one object, the whole act must be treated as void from the manifest inability of the court to chose between the two, and hold the act valid as to one and void as to the other. (p. 204.)

CONSTITUTIONAL LAW—Title to Act.—The generality of the title to an act is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection with it. (p. 204.)

CONSTITUTIONAL LAW—Title of Act.—If the legislature is fairly apprised of the general character of an enactment by the subject expressed in the title, and all its provisions have a just and proper reference thereto, and are such as by the nature of the subject so indicated are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such character, the requirement of the constitution that the title of an act shall embrace but one subject is complied with. (p. 204.)

CONSTITUTIONAL LAW—Title of Act.—It matters not that an act embraces technically more than one subject, one of which only is expressed in its title, so long as the subjects are not foreign and extraneous to each other, but blend together in the common purpose evidently sought to be accomplished by the act. (p. 204.)

CONSTITUTIONAL LAW—Title to Act.—If the provisions of a statute all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in its title, they may be united in one act. (p. 205.)

CONSTITUTIONAL LAW—Title to Act.—Objections should be grave, and the conflict between the constitution and the statute palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject in its title. (p. 205.)

CONSTITUTIONAL LAW—Title of Act.—However numerous the provisions of an act may be, if they can be, by fair intendment, considered as falling within the subject matter legislated upon in the act, or necessary as ends and means to the attainment of such subject, the act is not in conflict with a constitutional provision that no act shall embrace more than one subject which must be embraced in its title. (p. 206.)

CONSTITUTIONAL LAW—Title of Act.—A constitutional provision that no act shall embrace more than one subject which shall be expressed in its title is not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. (p. 206.)

CONSTITUTIONAL LAW—Title to Act—Subject of Act.—The entire statutory law of the state upon the subject of irrigation and the reclamation of arid lands may be incorporated in a single original or amendatory act under a proper title. (pp. 210, 211.)

CONSTITUTIONAL LAW—Consolidation of Statutes by Amendment.—If two acts have been passed by the legislature on the same general subject, but with differently worded titles, such acts may be amended and combined by one act, with a proper title. (p. 211.)

CONSTITUTIONAL LAW—Assessments According to Benefits—Due Process of Law.—If an irrigation law provides for assessments and also the method and means by which benefits received may be adjudicated, it is not unconstitutional as taking private property without due process of law under the guise of taxation or otherwise. (p. 212.)

W. E. Borah and J. J. Blake, for the appellant.

J. C. Rice and J. M. Thompson, for the respondent.

315 SULLIVAN, J. This action was commenced to obtain the confirmation of the district court of the third judicial district, in and for Canyon county, of the proceedings under and by which the respondent, the Pioneer Irrigation District, was organized, and the proceedings had and done by it relative to the assessment of the real estate within said irrigation district, and the issuance and sale of certain bonds of said district. The respondent district having filed its petition for said purpose in said court, the appellant, being a party in interest, appeared and demurred to said petition. Said demurrer put in issue the constitutionality of the statutes authorizing the organization of irrigation districts. It was overruled, and thereupon the appellant filed his answer putting in issue the material allegations of the petition. A trial was had upon the issues thus made, and the court entered an order and judgment confirming the incorporation of the respondent, thereby adjudging the same to be regular and valid, and all proceedings thereunder valid. During the progress of the trial, the appellant, by numerous objections, raised the question of the constitutionality of the original act and the act amendatory thereof, under which these proceedings were had. After judgment, the appellant made his motion for a new trial, which motion was overruled by the court, and this appeal is from said judgment and order. The questions presented for decision on this appeal involve the constitutionality of an act entitled: "An act to provide for a state engineer, defining his duties and regulating his compensation, and to provide for the acceptance by the state of Idaho from the United States of certain lands, and to provide for the reclamation, occupation and disposal of the same" ³¹⁰—approved March 2, 1899 (5th Sess. Laws, Pinney's ed., 444)—and an act amendatory thereof entitled: "An act to amend

sections 2, 11, 22 and 26 of an act entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, and for other similar purposes,' approved March 6, 1899; and to amend section 9 of chapter 1, and section 16 of chapter 2 of an act entitled 'An act to provide for a state engineer defining his duties, and regulating his compensation, and to provide for the acceptance by the state of Idaho from the United States of certain lands; and to provide for the reclamation, occupation and disposal of the same,' approved March 2, 1899, and to provide for the acquisition of right of way for the construction of canals or reservoirs or other irrigation works over or upon the lands of the state of Idaho": Sess. Laws 1901, p. 191.

The first contention is that said amendatory act clearly violates the provisions of section 16, article 3, of the constitution of this state, which section is as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." It is contended that said amendatory act embraces, at least, two separate and distinct subjects, and that said subjects have been individualized by former acts of the legislature to wit the subject of the formation of irrigation districts, and the subject of providing for the acceptance, by the state, from the United States, of certain public land, under what is popularly known as the "Carey act," and the compensation and duties of the state engineer; and also the subject of providing for the right of way for canals upon said and other lands; that said subjects are all set forth in the title, and are all covered by the act, and that, therefore, said entire act must fall, as it is not in the power of the court to say which one of the subjects thus legislated on in said act shall stand, or which shall fall. In support of the latter proposition counsel cites, among other authorities, Cooley's Constitutional Limitations, page 178, section 148, where the author says: "If the title to the act actually indicates, and the act itself actually embraces, two different objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, holding the act valid as to one, and void as to the other." And clearly, under the decided weight

of authority, if said title contains two distinct subjects, and both of said subjects legislated upon in the body of said act, the act is absolutely void, as it is in contravention of said section of the constitution. The object and purpose of said constitutional provision is well understood. It was to prohibit the practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection; to prohibit "hodgepodge," or "logrolling" legislation: Cooley's Constitutional Limitations, 172. It was to avoid improper influences which may result from an intermingling in one and the same bill such things as have no proper relation to each other: *Walter v. Town of Union*, 33 N. J. L. 352. In *State v. Ransom*, 73 Mo. 78, it is stated that said provision is to prevent conjoining, in the same bill, incongruous matter, and subjects having no legitimate connection, or relation to each other, and in no way germane to the subject expressed in the title. In commenting on the generality of the title to bills (Cooley's Constitutional Limitations, 6th ed., 172), the author says: "The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." In *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788, the supreme court of Minnesota in commenting on a section of the constitution of that state which provides that "no law shall embrace more than one subject, which shall be expressed in the title," said: "It [said provision] was not intended to embarrass legislation by making laws more restrictive in their scope and operation than ³¹⁹ is reasonably necessary in order to conserve the purpose for which the constitutional limitation was adopted; hence it must be liberally construed, and in a common-sense way," and quotes as follows from *State v. Cassidy*, 22 Minn. 324, 21 Am. Rep. 765: "If the legislature is fairly apprised of the general character of an enactment, by the subject expressed in the title, and all its provisions have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such a character, the requirement of the constitution is complied with. It matters not that the act embraces technically more than one subject, one of which only is expressed in the title, so that they are not foreign and extraneous to each other, but blend together in the common purpose evidently sought to be accomplished by the law." In commenting upon a constitu-

tional provision like the one here under consideration in *State v. Board of Commrs. of Humboldt County*, 21 Nev. 235, 29 Pac. 974, after reciting the purpose of said provision substantially as stated in Cooley's Constitutional Limitations, 172, the supreme court of Nevada said: "This, then, being the mischief against which this clause of the constitution is directed, it should be so construed as to correct the evil, but at the same time not to needlessly thwart honest efforts at legislation. There is scarcely any subject of legislation that cannot be divided and subdivided into various heads, each of which might be made the basis of a separate act, and in which the connection between them may be made a matter of controversy. . . . If the provisions of a statute all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title, it is permissible to unite them in the same act. . . . The objections should be grave, and the conflict between the constitution and statute palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject." And to the same effect is the decision in the case of *Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391, 27 L. ed. 431. In ³¹⁹ *People v. Parks*, 58 Cal. 624, it is said: "Provisions of an act may be numerous; but however numerous, if they can be, by fair intendment, considered as falling within the subject matter of legislation, or necessary as ends and means to the attainment of the subject, the act will not conflict with the constitution." This case is cited with approval and quoted from in *People v. Mullender*, 132 Cal. 217, 64 Pac. 299. The supreme court of Oregon in *Investment Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188, said: "We are required to look to the body of the act, and the provisions therein contained for the ascertainment of the subject matter. The title is of but little importance, except to index and fairly indicate the subject of legislation. Matters germane to or properly connected with the subject, or matters of detail, have no place in the title, although the circumstance of their being found there affords no constitutional reason for rendering the act void or inoperative. . . . The object of this clause of the constitution, so far as the objection here made to the act is concerned, is to prevent the combining of incongruous matters, and objects totally distinct, and having no connection nor relation with each other." In *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855, this court said: "Section 16, article 3, of the constitution, must be

given a reasonable construction. It is sufficient if the act treats of but one general subject, and that subject expressed in the title." In *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, the court of appeals, in commenting on a provision of the constitution of that state, like the one under consideration, said: "And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject." If the entire statutory law of this state upon the subject of irrigation and the reclamation of arid land should be incorporated into a single act, it would contain, among other provisions, every provision of the two acts, the constitutionality of which is called in question on this appeal. As bearing upon the point under consideration, see *State v. County Judge*, 2 Iowa, 281. Further citations might be made bearing upon this ²²⁰ point, as they are numerous, but we deem it unnecessary to make further citations.

We shall now proceed to apply the well-recognized rule, laid down by the above-cited authorities, applicable to said amendatory act, and ascertain whether it is clear and beyond a doubt that said act is obnoxious to said provision of our constitution, for, if there be a doubt as to the constitutionality of said act, it must be held valid. First, as to the title of said amendatory act: The first paragraph thereof is as follows: "An act to amend sections 2, 11, 22 and 26 of an act entitled, 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, and for other and similar purposes,' approved March 6, 1899." This title is sufficiently comprehensive to authorize the amendment of said sections 2, 11, 22 and 26 of said original act, and comes clearly within the purview of the provision of said section of the constitution, so far, at least, as the amendment of said four sections is concerned. Section 2, as amended, prescribes the steps that must be taken in the organization of an irrigation district, and every provision of said section is germane to that subject. It prescribes the duties of the state engineer in the organization of an irrigation district as follows: "A copy of such map, estimate, and description of such boundaries shall be filed in the office of the state engineer at least sixty days before the date set for such hearing by the board of county commissioners. It shall be the duty of said state engineer to critically examine such map, estimate and

description of said boundaries, and, if he shall deem necessary, to verify the same by a careful examination of the proposed district, and the site of the proposed works; and he shall prepare a report which shall discuss the water supply of the proposed district and the feasibility of the plans submitted for the reclamation of the lands thereof, and all other features pertaining to the irrigation of the proposed district. The state engineer shall submit said report to the board of county commissioners at the meeting set for the hearing of ³²¹ said petition for organization. Whenever the state engineer shall, after having critically examined the plans of said petitioners and looked into all that pertains to the reclamation of the lands of the proposed district, report to the board of county commissioners against the organization of such district, said board of county commissioners shall refuse to further consider such petition; but when said engineer shall approve of such organization, said board of county commissioners may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing make such changes in the proposed boundaries as they may find proper and as are approved by the state engineer, and shall establish and define such boundaries." Sections 2, 3 and 4 of said act amend sections 11, 22 and 26 of the original act. It is not questioned but that each and every provision of sections 11, 22 and 26, as amended, are germane to the subject matter treated of, and are necessary ends and means to the attainment of the purpose of said act. The second clause of said title is as follows: "And to amend section 9 of chapter 1, and section 2 of an act entitled 'An act to provide for a state engineer, defining his duties and regulating his compensation, and to provide for the acceptance by the state of Idaho from the United States of certain lands; and to provide for the reclamation, occupation and disposal of the same,' approved March 2, 1899." Section 5 of said amendatory act amends section 9 of the original act, and is as follows: "The state engineer shall inspect, or cause to be inspected, as often as he thinks advisable, every dam or embankment used for holding water in this state, where the same is more than twenty feet in height; and if, after any such inspection, such dam or embankment, in the opinion of the state engineer, is unsafe, and the life or property liable to be endangered by reason thereof, he shall order the owner or owners to repair the same so as to make it safe; and if such owner or owners shall neglect or refuse to repair the same after a reasonable notice to that effect has been given in writing by

the state engineer, the said state engineer shall report the facts in the case to the judge of the district court of the district in ³²² which such dam or embankment is situated, who shall, after hearing such facts, if he deem it necessary for public welfare, order the water master of the district in which such dam or embankment is situated, if there be one, if not, the sheriff of the county, to draw off such water from behind such dam or embankment, and to keep said water drawn off till such time as the orders of the state engineer shall be complied with; provided, that when great damage would result to those depending upon such dam or reservoir embankment for irrigation if such withdrawal of water were made, and when such impending danger to life and property can be prevented at reasonable expense without such withdrawal being first made, the state engineer shall make an estimate of the cost of such necessary repair, and report the same to the district judge, who shall, if he deem it necessary for the public welfare, order the board of county commissioners of the county in which said works are situated to make, under the direction of the state engineer, such repairs as are recommended by said engineer, and to pay for the same by warrants drawn on the current expense fund of the county. The county auditor and recorder shall immediately present a bill of the amount of such expenses to the person or persons owning or controlling such dam or embankment, and unless the same is paid within three days from the presentation of said bill, or as much as shall not be so paid, shall thereafter become a lien upon the said dam or reservoir embankment and other irrigation works appurtenant thereto, which amount shall be added to the taxes against such property, and shall be collected in the manner provided by law for the collection of other taxes." Section 9 of the original act closes with the words "complied with," and the amendment consists of all that follows said words, and begins with the word "Provided." The amendment is contained wholly in the proviso. By the first clause of said amended section the state engineer is required to inspect, or cause to be inspected, every dam or embankment used for holding water in the state, where the same is more than twenty feet in height; and if he is of the opinion that it is unsafe, he must order the owner or owners ³²³ to repair the same. While this provision of said section is sweeping, and apparently refers to all dams or embankments used for holding water in the state, whether for irrigation or other purposes, the subsequent provisions of said sections would

indicate that the legislature had in mind only dams and embankments used to hold water for irrigation; for if the owner neglects to repair an unsafe dam after the engineer has ordered him to do so, the engineer must report the fact to the district court of the irrigation district in which such dam is situated, who shall, after a hearing, if he deems it necessary for public welfare, order the water master of such irrigation district to draw off such water from behind such dam or embankment, and to keep said water drawn off till such time as the orders of the state engineer are complied with; and further on in said section the following language is used, "That when great damage would result to those depending upon such dam, reservoir, or embankment for irrigation, if such withdrawal of water were made," etc. Taking all of the provisions of said section together, it is evident that the legislature, in enacting said section, had in mind dams and embankments used for storing waters for irrigation only, although the words used in the first provision of said section are sufficiently comprehensive to include all dams and embankments, whether used for storing water for irrigation or not. Section 6 of said amendatory act amends section 16 of said original act, and prescribes some of the duties of the state board of land commissioners immediately upon the withdrawal of any land for the state by the department of the interior of the United States, under and by virtue of the provisions of the act of Congress popularly known as the "Carey act." Said section 16, as amended, is as follows: "Immediately upon the withdrawal of any land for the state by the department of the interior, and the inauguration of work by the contractor, it shall be the duty of the board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the state capital for a period of four weeks, to give notice that said land, or any part thereof, as the board in their discretion may ³²⁴ deem is for the best interest of the state, is open for settlement, the price for which said land will be sold to settlers by the state and the contract price at which settlers can purchase water rights or shares in such works." Section 7 of said amendatory act amends section 19 of said original act, and it refers to the construction of irrigation works for the irrigation and reclamation of the land received by the state under the provisions of said act of Congress, the duties of settlers thereon, the amount of land that each settler must cultivate and reclaim before making final proof therefor, the making of such final proof,

and the steps necessary for the settler to take in order to procure a patent from the United States to the land settled upon. The last clause of said title is as follows: "And to provide for the acquisition of right of way for the construction of canals or reservoirs or other irrigation works over or upon the lands of the state of Idaho." And sections 8 and 9 of said act provide the method of procedure for obtaining rights of way for the construction of canals, reservoirs, and other irrigation works over and upon lands owned by the state, and come clearly within that subject, as stated in said subdivision 3 of said title.

It will be observed from the foregoing that all of the provisions of said act have but one general object, subject, or purpose, and that is the reclamation and irrigation of the desert or arid lands in the state. We do not think it will be seriously contended by any lawyer familiar with the irrigation laws of the state, and the amendatory act under consideration, that all of the provisions of said act are germane to the subject of reclamation and irrigation of the desert lands of the state; and if a complete codification of our laws touching upon that general subject were made, it must include each and every of the provisions of the amendatory act under consideration and above referred to. And, as stated in *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, the provision of the constitution under consideration was not intended "to prevent the incorporation into a single act the entire statutory law upon one general subject." The act in question does not attempt to do that. ³²⁵ It does, however, amend certain sections of prior separate acts, which acts are not adverse to the general subject of irrigation, but are congruous, and germane to that subject, and have a necessary connection therewith. Judge Cooley, in speaking of the history and purpose of said constitutional provision, said, "They were to prevent the practice of bringing into one bill subjects diverse in their nature, and having no necessary connection." Every provision of said amendatory act referred to in regard to irrigation districts is connected with the subject of irrigation. The duties of the state engineer are almost, if not entirely, connected with the subject of irrigation; and the act, which provides for the acceptance, by the state of Idaho from the United States, of certain desert lands, and to provide for their reclamation, occupation, and disposal, is germane to and connected with the subject of irrigation and the reclamation of desert land; and the acquisition of rights of way over and upon state lands for the construction of canals, reservoirs, or

other irrigation works is not diverse to the subject of irrigation, but necessarily connected with it. We therefore conclude that said act embraces but one subject, and matters properly connected therewith, and that said subject is sufficiently expressed in the title. It clearly shows that the subject of said act is the reclamation and irrigation of desert or arid land; and the language used in the title is sufficient to express that subject. The title of said act is more of an index of the general subject of irrigation than said provision of our constitution requires; and an act must not be held void for that reason.

It has been contended that the court has no authority to make a title to an act, and that is correct. In the case at bar, we do not make a title to the act under consideration, but hold that the title thereto contains but one general subject, and matters properly connected therewith, and that the act treats of but one general subject and matters properly connected therewith, and is a sufficient compliance with said provisions of the constitution.

³²⁸ It is suggested by counsel for appellant that, where matters have become the subject of legislation under distinct heads, and under separate and distinct acts, they are thereby made separate and distinct subjects, and that such acts cannot be amended by one bill, as that would be including two subjects under one title. The suggestion of counsel is correct if the subjects treated in the separate bills are incongruous and diverse to each other. If they are totally distinct, and have no connection nor relation with each other, they cannot be amended by one bill; but if they treat of matters that are germane to the same subject, and might properly have been enacted in one bill, under one title, and include but one general subject, they may be amended by one bill. Simply because the legislature has enacted laws on one general subject by separate and distinct bills does not prevent a subsequent legislature from combining such acts into one bill, or amend such separate acts by one bill with a proper title.

The next contention is that the original district irrigation act is unconstitutional, for the reason that it fails to require assessments to be made according to the benefits. Section 11 of the original act requires assessments to be made by acreage, and not according to the benefits; but that section has been amended by the amendatory act above referred to, and by its provisions directs that all assessments must be made according to the benefits accruing to each tract of land, and it is pro-

vided that the board of directors of each irrigation district "shall examine, critically, each tract or legal subdivision of land in said district with a view of determining the benefits which will accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works; and the cost of such work shall be apportioned or distributed over such tracts or subdivisions of land in proportion of the benefits accruing thereto; and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessment levied against such tracts or subdivisions in carrying out the purpose of this act." Said section further provides that the proceedings ³²⁷ of such board in the matters just referred to must be reported to and submitted to the proper court, with the other proceedings in the organization of such district, for the court's confirmation, as provided in sections 16, 17, 18, 19 and 20 of said act. And, under the provisions of said sections, anyone owning land in such district may appear and show that "the cost of the irrigation works of such district has not been apportioned or distributed in proportion to the benefits accruing to any tract of land in said district." It may be that the section of the original act providing for assessments to pay the cost of constructing or purchasing irrigation works for a district was unconstitutional, in that it failed to require them to be made according to the benefits accruing to each tract of land; but the amendatory act clearly provides for assessments to be made according to the benefits accruing to each tract of land in such district, and the action of the board in preparing lists of all real estate in their district, by which the assessments each year shall be made, may be contested in the district court, on the ground that such lists are not made with reference to the benefits accruing to each tract of land. Said amendatory act provides, in terms, that such assessments must be made according to the benefits, and provides the procedure or method by which the benefits to each tract of land in any irrigation district may be ascertained and adjudicated. As that is done said law is not repugnant to the provisions of the fourteenth amendment of the federal constitution, prohibiting the taking of private property without due process of law under the guise of taxation. It is a well-recognized fact that the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry, but some reasonable means or method must be provided by which the question of benefits may be adjudicated;

and the amendatory act, which takes the place of the original act under consideration, provides such means. It may be that in one district an assessment by acreage may be just, and according to the benefits, and in another not; and the law must provide some method whereby the taxpayer may have that question ³²⁸ adjudicated, if he wishes to do so, and in that regard the amendatory act is full and complete. That section of the original act, as amended, is not obnoxious to the fourteenth amendment to the constitution of the United States, as it does not provide for taking property without due process of law.

The judgment of the lower court must be affirmed, and it is so ordered. Costs are awarded to the respondent.

Stockslager, J., concurs.

Mr. Chief Justice Quarles Concurred in the conclusion reached, but dissented from some of the views expressed by the majority of the court. He said in part: "I concur in the conclusion reached, and think that the judgment appealed from should be affirmed, not upon the ground upon which the majority opinion affirms it, but upon the ground that the proceedings in the matter of organizing the irrigation district in question substantially comply with the provisions of the act of March 6, 1899, entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property for the distribution of water thereby for irrigation purposes, and for other and similar purposes,' found in acts of 1899, page 408. The suggestion in the majority opinion that that act is void so far as the provisions thereof relate to taxation, to my mind, is incorrect. . . .

"It is impossible for me to give my assent to the conclusion reached by my associates that the amendatory act of March 18, 1901, the title to which is set forth in the majority opinion, and in the syllabus, is constitutional and valid, and does not contravene the provision of section 16, article 3, of our state constitution. This provision of the constitution not only provides that the title to an act shall express the subject thereof, but it provides that no act shall relate to more than one subject. My associates very cleverly, ingeniously, and obligingly make a title for the said amendatory act, which is found in the body of the majority opinion, as follows, to wit, 'An act relating 'to the reclamation and irrigation of desert or arid land.' ' Now, take the title to said amendatory act, and no such subject is expressed in the title. Under the provisions of the constitution, the title is a part of the act, and is indispensable. The subject must be expressed in the title. It need not be named in detail, and the title need not index the act. But it must express the subject. The purview of the act is limited,

however, by the title, as all respectable authority holds. If the title expresses a subject which is a branch of a general subject, the legislature is confined to that branch of the general subject named in the title, and cannot legislate upon other branches of the same general subject in the act. In my opinion the general subject of the amendatory act under discussion, and which my associates hold to be 'the reclamation and irrigation of desert or arid land,' is not found in the title to said act."

The Title to Statutes, in respect to their sufficiency within the constitutional requirements, is discussed in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279. The constitutional requirements are construed liberally: *De-yoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28. And generality of title is not fatal: *People v. People's etc. Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; *State v. Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375. A court will not declare a statute unconstitutional on the ground of the insufficiency of its title if the question is a doubtful one: *Florida etc. Ry. Co. v. Hazel*, 43 Fla. 263, 99 Am. St. Rep. 114, 31 South. 272.

The Constitutionality of irrigation, drainage, and reclamation statutes is considered in *Mound City Land etc. Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 70 S. W. 721, 60 L. R. A. 190; *Matter of Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303, 49 L. R. A. 781; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 755; *Lamb v. Reclamation Dist.*, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *Elmore v. Drainage Commrs.*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010; *Beebe v. Magoun*, 122 Iowa, 94, *post*, p. 259, 97 N. W. 986.

IN RE BRICKEY.

[8 Idaho, 597, 70 Pac. 609.]

CONSTITUTIONAL LAW—Carrying Deadly Weapons.—A statute prohibiting private persons from carrying deadly weapons within the limits of any city, town, or village in the state, is unconstitutional and void. (pp. 215, 216.)

CONSTITUTIONAL LAW—Carrying Deadly Weapons.—A statute prohibiting the carrying of concealed deadly weapons is a proper exercise of the police power, and is valid, but a statute prohibiting the mere carrying of firearms is void, as the right to do so is guaranteed by the state and national constitutions. (p. 216.)

S. S. Denning, for the petitioner.

M. S. Johnson, county attorney, for the state.

509 **QUARLES, C. J.** The petitioner applies to this court for a writ of habeas corpus, and in the petition sets forth and shows that he is unlawfully imprisoned confined, and restrained of his liberty by A. W. Kroutinger, sheriff of Nez Perces county, at the county jail in the county of Nez Perces, in the state of Idaho; that he is so imprisoned under a commitment which issued out of the justice's court of West Lewiston precinct, in the county of Nez Perces, in a criminal action wherein petitioner was convicted upon the charge of carrying a deadly weapon, to wit, a loaded revolver, within the limits and confines of the city of Lewiston, contrary to the provisions of the act of the territory of Idaho approved February 4, 1889 (Sess. Laws 1889, p. 27); and, in accordance with the prayer of said petition, the writ was issued, and return thereto duly made by the said sheriff. From the petition and return it appears that the only offense charged against the petitioner, of which he has been convicted, and is now restrained of his liberty, is that he carried a deadly weapon within the limits of the city of Lewiston, in contravention of the said act of February 4, 1889. The second amendment to the federal constitution is in the following language: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The language of section 11, article 1 of the constitution of Idaho is as follows: "The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this 500 right of law." Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing

arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void. The statute being void, the said justice's court had no jurisdiction of the subject matter of the action, and the said judgment of conviction, and the commitment which issued thereon, and the detention of the petitioner under said commitment and judgment of conviction, are illegal and void.

The said judgment being void, habeas corpus will lie, and the prisoner should be discharged from custody, and it is so ordered.

Sullivan, and Stockslager, JJ., concur.

The Carrying of Concealed weapons may be regulated and prohibited by legislative authority: See *State v. Smith*, 157 Ind. 241, 87 Am. St. Rep. 205, 61 N. E. 566; *Dunstan v. State*, 124 Ala. 89, 82 Am. St. Rep. 152, 27 South. 333; *Van Buren v. Wells*, 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38; notes to *Bliss v. Commonwealth*, 13 Am. Dec. 255; *Fife v. State*, 25 Am. Rep. 561-563. The arms which the constitution guarantees citizens the right to keep and bear are such as are needful to and ordinarily used by a well-regulated militia, and such as are suitable to enable a free people to resist oppression, prevent usurpation, repel invasion, and the like: *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

ROBERSON v. TIPPIE.
[209 Ill. 33, 70 N. E. 584.]

HOMESTEADS—Estate in Land.—A homestead is an estate in land, and not merely an exemption; and when the interest of the homesteader does not exceed in value the statutory limit, the homestead estate comprises his entire title, leaving no interest to which liens can attach on which he can convey separately. (pp. 219, 220.)

HOMESTEADS—Basis of Estate.—A homestead estate is based upon the title of the homesteader, and can have no separate existence independent of the title which constitutes one of its essential elements and from which it is inseparable. (p. 220.)

HOMESTEADS—Descent of.—Upon the death of the homesteader, the homestead estate by operation of law devolves upon the surviving husband or wife for life and upon their child or children during the minority of the youngest, and the heirs at law take a reversionary interest only, expectant upon the termination of the estate for life or for years created by the statute. (p. 220.)

HOMESTEADS—Conveyance of—Husband and Wife.—The statutory provision declaring that no conveyance of the homestead shall be valid unless in writing, subscribed by the homesteader and his wife applies to deeds made by a husband to his wife, and therefore a conveyance of a homestead, not exceeding the statutory value, by a husband to his wife, she not joining therein, is absolutely void and passes no title. (p. 220.)

HOMESTEADS—Conveyance of—Husband and Wife.—The amount paid by a wife as a consideration for the conveyance of a homestead to her by her husband, in which she does not join, as required by statute, is not a lien, in law or equity upon the land attempted to be conveyed. (p. 220.)

C. H. Layman, for the appellant.

W. H. Hart, for the appellees.

20 WILKIN, J. On March 27, 1903, appellant filed her bill against appellees, who are the children and heirs at law of

Levi Y. Roberson, deceased, to enforce the specific performance of a contract. The allegations of the bill are as follows: September 29, 1889, the appellant, at the age of twenty-one years, was married to Levi Y. Roberson, who was then six years of age. Each had been previously married and each had children had been born to the said Levi by his former wife, of whom had reached their majority and left home before marriage with appellant. The appellant had one child by former marriage, and subsequently there was born to her the said Levi Y. Roberson a child, which is still living. At the date of the marriage of appellant and Roberson he was owner of certain real estate described in the bill, which was at that time his homestead and continued to be the homestead of appellant and the said Levi Y. Roberson to the date of his death, and since that time has continued to be the homestead of appellant. After the birth of their child the said Roberson, on January 5, 1892, for a consideration of five hundred dollars paid by appellant, executed a warranty deed to her for the said homestead and put her in possession thereof, and she has continued in such possession since that date, paying all taxes thereon, and has made valuable improvements thereon. By the omission of appellant, who was then the wife of the said Levi Y. Roberson, to sign said deed, the same was inoperative to pass the legal title to the land, but the equitable title thereto, by virtue of said deed, was in appellant. The said Levi Y. Roberson died January 25, 1903, and left appellant, his wife, and the appellees, his children and grandchildren, surviving him, as his only heirs at law. The bill prays that appellant be vested with the title to said real estate, with a prayer for general relief.

A demurrer was filed to the bill, and the same was sustained by the chancellor. The bill was then amended ⁴⁰ by adding the following allegations: That "the five hundred dollars paid by appellant for said land was used by the said Levi Roberson in repairs and planting an orchard on said land and otherwise improving it, and in equity appellant was entitled to be reimbursed and to have an equitable lien on said land for the same; that at the time said Levi Roberson made said deed he was indebted to any person, and said sale was free from fraud and circumvention of all kinds; that in case specific performance cannot be decreed, the court find the amount paid by appellant, and that a lien be decreed to exist in her favor against said lands for the same, and if not paid, that the land be sold

pay the same." To this bill, as amended, a demurrer was sustained and the amended bill dismissed for want of equity at the cost of appellant, and from that order she appeals.

The one question presented for our decision is the correctness of the ruling of the chancellor sustaining the demurrer and dismissing the bill, which involves the construction to be placed upon section 4 of chapter 52, entitled "Exemptions": 2 Starr & Curtis' Statutes, 1874. That section provides, in substance, that no release, waiver or conveyance of the homestead estate shall be valid unless the same is in writing, subscribed by the householder, and his or her husband or wife, etc. It went into force and effect July 1, 1873, and we have held that prior to this act the right of homestead was a mere exemption, and when the householder in whom the exemption existed, conveyed without the formal waiver of homestead, the effect was to transfer his title to the land, but so far as it affected the homestead right the operation of the deed was suspended until the exemption was extinguished. But by the act of 1873 the householder became vested with an estate in the land, measured and defined by the value, and not by the extent or quality, of his interest in the land or lot, and when the interest of the householder in the premises, whether in fee, for life ⁴¹ or for years, does not exceed one thousand dollars in value, the homestead estate comprises and embraces his entire title and interest, leaving no separate interest in him to which liens can attach or which he can alien distinct from the estate of homestead. The estate of homestead thus created is based upon the title of the householder, and can have no separate existence independently from the title, which constitutes one of its essential elements and from which it is inseparable. Upon the death of the householder, in whom the estate of homestead is primarily vested, the estate, by operation of law, devolves upon the surviving husband or wife for his life or her life, and upon the children of the household during the minority of the youngest, and the heirs at law take a reversionary interest only, expectant upon the termination of the estate for life and for years, created by the statute. The statute, which declares that no conveyance of the homestead shall be valid unless the same is in writing, subscribed by the householder and his wife, applies to deeds made by husbands to their wives, and therefore a conveyance of the homestead not exceeding in value one thousand dollars by a householder to his wife, she not joining therein and acknowledging the same as required by the statute, is absolutely void

and passes no title whatever: *Kitterlin v. Milwaukee Mechanics Mut. Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Dinsmoor v. Rowse*, 200 Ill. 555, 65 N. E. 1079. By this bill it is shown that the homestead estate here involved did not exceed in value one thousand dollars when attempted to be conveyed. The deed to appellant was therefore a nullity, conveying no title or interest in the premises, and at the date of her husband's death the fee simple title therein vested immediately in his heirs, subject only to her right of homestead and dower. This being so she could have no claim or lien upon the property for the five hundred dollars invested therein, either in law or in equity. It cannot be seriously contended that the allegations of the bill are sufficient to entitle her to the specific performance ⁴² of a contract or to authorize a decree declaring her the equitable owner of the land. Her right to recover the amount paid for the homestead may be a subsisting valid claim against her husband's estate, but that question is not involved in this action.

We entertain no doubt that the demurrer to the amended bill was properly sustained, and the order dismissing the same for want of equity, at complainant's cost, must be affirmed.

Decree affirmed.

The Conveyance of a Homestead by one only of the spouses is generally held void: See the monographic note to Jerdee v. Furbush, 91 Am. St. Rep. 911, on the effect of a conveyance or encumbrance of the homestead by one spouse only. As to whether this rule applies where the conveyance is by one spouse to the other, see pages 923-926 of this note.

HEPPE v. SZCZEPANSKI.

[209 Ill. 88, 70 N. E. 737.]

PROBATE COURTS—Jurisdiction.—The probate court in adjusting the accounts of executors, administrators, and guardians, has equitable jurisdiction and may adopt equitable forms of procedure. (p. 224.)

PROBATE COURTS—Jurisdiction at Subsequent Term.—A probate court has jurisdiction, at a subsequent term, to set aside an order discharging an executor and approving his report reciting the release of the widow's award, if such release was obtained by fraud, accident, or mistake. (p. 224.)

PROBATE COURTS—Validity of Order Made at Subsequent Term.—A probate court order made at a subsequent term setting aside an order discharging an executor and releasing a widow's award, is void as to minor heirs in reviving the claim of the widow and directing the sale of the minor's interests in land, if the only showing of notice to the minors necessary to jurisdiction over them, is a recital in such order that they appeared by guardian ad litem, whose appointment is not shown by the record. (p. 225.)

JUDICIAL SALES—Heirs as Parties.—If a petition is filed by an administrator or executor for the sale of land to pay debts, minor heirs must be made parties, and must be served with summons. (p. 229.)

JUDICIAL SALES.—Service of Summons on Heirs in a proceeding by an executor to sell real estate to pay debts by leaving a copy for them with the widow, their mother, and informing her of its contents is void when she is the real, though not the nominal, petitioner, and is acting adversely to the interests of such heirs. (p. 229.)

JUDICIAL SALES—Service of Summons on Heirs.—If a bill is filed against minor heirs to subject their land to sale, the service of summons on them by leaving a copy thereof with the complainant, and informing him of its contents, will confer no jurisdiction on the court, as to the person of such minors, and the decree of sale rendered on such service is void as to them. (p. 230.)

SALES—Purchaser With Notice.—A purchaser of a note and mortgage is chargeable with notice of their fraudulent character if enough appears of record to put him upon inquiry which could not have failed to disclose the facts. (p. 231.)

PARTITION—Cotenancy.—Compensation allowed for improvements made by one cotenant without the knowledge of the others should on partition be so estimated as to inflict no injury upon the cotenant against whom the improvements are charged. (p. 231.)

A. H. Meades, for the appellants.

A. Tripp, for the appellees.

* MAGRUDER, J. By the death of the testator, Frank Szczepanski, on January 10, 1895, his widow and four daughters became, as devisees by the terms of his will, the owners each

of an undivided one-fifth interest in the lot, described in the bill herein, and sought to be partitioned. By the subsequent death of two of the children, who were minors, the appellees, the two surviving children, also minors, became the owners each of an undivided six-twentieths of the premises in question, and the widow, Katharina Obecny, then the wife of Witt Obecny (formerly Katharina Szczepanski), became the owners of an undivided eight-twentieths of said lot. Therefore, the widow, Katharina Obecny, and the appellees, Rosalia Szczepanski, and Marianna Szczepanski, minors, were ⁹⁸ tenants in common, owning the respective undivided interests above named at the time of the transactions hereinafter named.

No claims whatever appear to have been filed by creditors against the estate of the deceased testator, Frank Szczepanski. The widow's award was fixed by the appraisers at thirteen hundred and thirty dollars, and the whole amount of the personal property was appraised at four hundred and eight dollars and fifty-two cents. After the personal property, amounting to four hundred and eight dollars and fifty-two cents, was applied upon the widow's award, there remained a deficiency of nine hundred and twenty-one dollars and forty-eight cents. In March, 1897, the executor made his final report, and attached to the report was a receipt by the widow for the four hundred and eight dollars and fifty-two cents to be applied on her award of thirteen hundred and thirty dollars, and also attached to such final report was a release by the widow of the balance of her award, to wit, nine hundred and twenty-one dollars and forty-eight cents. As a part of the receipt and release, so attached to the executor's final report, the widow assented that such report be accepted as a final report, and that the executor, Joseph Kucharski, be discharged from all further duties as the executor of the last will of her deceased husband. Accordingly, on March 30, 1897, an order was entered by the court, by the terms of which such final report was accepted, and the executor was discharged. It appears from such portions of the record of the probate court in the estate of the deceased testator as were introduced in evidence, that on March 5, 1897, a written notice to the appellees, being then minors, was drawn by the attorneys of the executor, to the effect that he had filed his final report, and would, on March 19th, ask to have the executor discharged from further service, and the report confirmed. This notice was served by leaving copies with Rosalia and Marianna Szczepanski, the appellees herein, on March 9, 1897. Section 112

of the act in regard to the administration of estates provides "that no final settlement shall be made and approved by the court, unless the heirs of the decedent have been notified thereof, in such manner as the ⁹⁷ court may direct": 1 Starr & Curtis' Annotated Statutes, 2d ed., pp. 336, 337. It does not appear here that this service of notice upon the minor devisees in person was a service "in such manner as the court may direct," it not being shown that the court made any direction upon the subject. But it is immaterial whether the appellee minors were properly served with notice of the filing of the final report and the discharge of the executor or not, because the final order of March 30, 1897, was favorable to the minors, in that thereby the unpaid portion of the widow's award, to wit, nine hundred and twenty-one dollars and forty-eight cents, which was a claim against the estate, was released at the same time when the executor was discharged. The estate of the minors was thereby relieved from liability for said portion of the widow's award so released.

Subsequently, however, on June 11, 1897, a petition was filed by the widow, who had then become the wife of Witt Obecny, and who was a tenant in common in the ownership of the premises with the minor appellees, to set aside the order discharging the executor, and releasing the balance of the widow's award remaining after applying the amount of the personal property thereon. Afterward and in pursuance of this petition, an order was entered by the probate court on June 21, 1897, vacating the order of March 30, 1897, discharging the executor, and in such order of vacation it was recited that the widow should have leave to withdraw her receipt for the balance of the widow's award upon the ground that the same had been signed by her by mistake, and it was therein ordered that the executor proceed to sell the real estate of the deceased to pay such balance, after presenting to the court a just and true account of the personal estate, and debts of the deceased, as required by statute.

1. It is contended on the part of appellees, and it was found by the court below in its decree, that the order of June 21, 1897, vacating the previous order of ⁹⁸ March 30, 1897, was void as having been made at a term subsequent to that at which the vacated order was entered. After the order of March 30, 1897, was entered, two terms had passed before the order of June 21, 1897, was entered, which set aside the previous order discharging the executor.

We are unable to agree with the court below in the view that the court was without jurisdiction to enter the order of June 21, 1897, for the reason that it was made at a subsequent term to the order of March 30, 1897. Undoubtedly, the general rule is that, after a term has passed, a court has no authority or discretion at a subsequent term to set aside a judgment or to amend it, except in matters of form, and for the purpose of correcting clerical errors: *Ayer v. City of Chicago*, 149 Ill. 262, and cases referred to on p. 266, 37 N. E. 57, 58. It has been held by this court in a number of cases that the county court or probate court in the settlement of estates is vested with equitable as well as legal powers; and that, in the adjustment of accounts of executors, administrators and guardians, the county court has equitable jurisdiction and may adopt equitable forms of procedure: *Millard v. Harris*, 119 Ill. 185, and cases on p. 198, 10 N. E. 387, 394, *Spencer v. Boardman*, 119 Ill. 553, 9 N. E. 330; *Shepard v. Speer*, 140 Ill. 238, 29 N. E. 718. In the latter case of *Shepard v. Speer*, it was said, that the probate court, when adjudicating upon matters pertaining to the settlement of estates, is clothed with authority to exercise equitable powers like a court of equity. A court of equity would certainly have power to set aside such an order as that of March 30, 1897, if the entry of the latter order had been procured by fraud, or was due in any way to accident or mistake. Fraud, accident and mistake are well-established grounds of equity jurisdiction. The order of June 21, 1897, entered by the probate court, setting aside the previous order, recites that the receipt and release executed by the widow, giving the balance that was due to her upon her award, were so executed by mistake. ⁹⁹ The order recites that it appeared to the court from evidence introduced that the widow signed such receipt by mistake. Therefore, the probate court, in the exercise of its equitable powers, had a right to set aside and vacate the order, discharging the executor, even though such action was taken by it at a subsequent term. In *Schlink v. Matton*, 153 Ill. 447, 38 N. E. 1063, it was held that the probate court, in the exercise of its equitable jurisdiction, might entertain a motion at a subsequent term set aside its own order, allowing a claim against an estate, if mistake or fraud had intervened, and in that case it was said: "So, here, although the term of court, at which an allowance was made, has passed, it may for such cause as would move a court of equity upon a bill filed, entertain a motion to set aside the allowance." In *Strat*

v. Phillips, 189 Ill. 9, 59 N. E. 560, the cases of Millard v. Harris, 119 Ill. 185, 198, 10 N. E. 387, 394, and Schlink v. Maxton, 153 Ill. 447, 38 N. E. 1063, were referred to and approved: See, also, Marshall v. Coleman, 187 Ill. 556, 58 N. E. 628; Tanton v. Keller, 167 Ill. 144, 47 N. E. 376; Wright v. Simpson, 200 Ill. 56, 65 N. E. 628.

It is a matter of doubt, however, although the probate court may have had jurisdiction to enter the order of vacation at a subsequent term, whether, when the order of vacation was entered, the court had jurisdiction over the persons of the minors. The order, vacating the previous order, discharging the executor and reinstating the claim of the widow for the balance of nine hundred and twenty-one dollars and forty-eight cents due upon her award, was against the interest of the minors. It restored a claim which had been released, and directed that their land should be sold for the payment of that claim. It was important, therefore, that they should have notice. It is true that the order of June 21, 1897, makes the following recital: "And also come Rosalia Szczepanski and Marianna Szczepanski, minor heirs of said deceased, by their guardian ad litem." But it nowhere appears in the record that they received any actual notice that the order of June 21, 1897, vacating the order discharging the executor would be applied for. ¹⁰⁰ When a guardian ad litem is appointed to act for a minor, it must be for a minor who is a party to the suit. "A guardian ad litem has been defined to be a person appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party": 10 Ency. of Pl. & Pr. 616. It is nowhere shown that these appellees who are minors, and who own twelve-twentieths of the land ordered to be sold, were made parties by any service of any kind. Nor is there any order showing the appointment of a guardian ad litem to represent them. The order of June 21, 1897, not only vacated the previous order of March 30, 1897, but it contained also the following order, to wit: "That Joseph Kucharaki, executor of the last will and testament of said deceased, proceed to sell the real estate of said deceased to pay such balance," etc. Section 99 of the act in regard to administration of estates provides that the widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, etc., shall be made parties: 1 Starr & Curtis' Annotated Statutes, 2d ed., p. 325. We are inclined to the opinion that the order of June 21, 1897, at least so far as it directed the executor to make a sale of these premises, was void

as against these appellees for want of jurisdiction over them by proper service of notice or process. The order of June 21, 1897, does not recite or state that such minors had due notice, but merely recites that a guardian ad litem, whose appointment is not shown, came into court when the order was entered. The master found in his report "that the record does not establish the fact that said Rosalia and Marianna Szczepanski were served with notice of the presentation of said petition to withdraw said receipt, and to sell said real estate." In the case at bar there is no recital of service in the order of June 21, 1897, which cures the failure of the record to show service: *Law v. Grommes*, 158 Ill. 492, 41 N. E. 1080; *Burr v. Bloemer*, 174 Ill. 638, 51 N. E. 821; *Botsford v. O'Conner*, 57 Ill. 72.

¹⁰¹ 2. Independently, however, of any question as to the void character of the order of June 21, 1897, the record discloses such facts as make it inequitable to sustain the sale and transfer made of the interest in the property in controversy, which belonged to the minor appellees. The vacation of the order, which discharged the executor, and the reinstatement of the released claim of the widow for the balance due upon her award, were not made in good faith for the purpose of realizing by a sale an amount of money necessary to pay what was due her. A scheme was concocted by Theodore H. Schintz, acting with Katharina Obecny and her husband, Witt Obecny, and her brother, Kazmierz Kluczynski, which had for its object the acquisition of such a title to the interests of the appellees in this lot, as would enable Schintz to make a loan thereon. When Mrs. Obecny and her husband went to consult Schintz on June 10, 1897, he suggested to them to find someone whom they could trust, and she thereupon named her brother, Kluczynski. On the very next day, to wit, June 11, 1897, Schintz, as attorney for Mrs. Obecny, filed a petition for her to set aside the order by which the balance due on her widow's award had been released and the executor had been discharged. At the same time, he drew a note for four thousand dollars, and the trust deed to himself, as trustee, securing the same, upon the whole of the lot, including the interests not only of the appellees, but of the widow. He thereupon induced Kluczynski, the widow's brother, to sign the note and trust deed, the former being payable to the latter's own order and indorsed by himself. Kluczynski says that he received no money when he signed the note and trust deed, and that he did not know what he was signing. He was merely requested to sign such papers as would enable

his sister and brother in law to obtain some money to put up a new building upon the lot in question. The trust deed to Schintz to secure the note for four thousand dollars ¹⁰² was dated June 10, 1897, and recorded on June 11, 1897, the very day on which the petition to set aside and vacate the order of March 30, 1897, was filed. At the time when this trust deed to Schintz was executed, Kluczynski had no title at all to this lot, or any portion of it. The record showed that the title was in Katharina Obecny and her two minor children, the present appellees. After the order of June 21, 1897, vacating the previous order had been entered, and after the trust deed, securing the note for four thousand dollars had been executed and recorded, then a petition was filed in the probate court by the executor for the sale of the lot, in order to pay the nine hundred and twenty-one dollars and forty-eight cents due to Mrs. Obecny upon her award. This petition was filed on September 8, 1897. On October 8, 1897, an order was entered directing a sale of the property at public vendue for cash, in order to realize the amount of money to pay the deficiency due upon the widow's award. After notices published and posted, a sale was made on November 12, 1897, of the whole of the lot to Kluczynski for the sum of eleven hundred dollars. This sale was reported to the probate court, and approved. But the probate court was evidently imposed upon. The evidence shows clearly that Kluczynski was not present at the sale, and knew nothing about it. He did not pay for the purchase of the property to the executor making the sale the sum of eleven hundred dollars, or any other sum, nor did his sister, Mrs. Obecny, pay any money. Both she and the purchaser, Kluczynski, swear that they paid nothing, and knew nothing about the approval of the sale. There is nothing to show that this eleven hundred dollars was paid into court, or that any portion of it was credited upon the widow's claim for the balance of her award. The notice of the sale announced that the property was unencumbered, and would be sold subject to the dower and homestead of the widow. At the time when this announcement was made that the property was unencumbered, the trust deed to secure four thousand dollars to Schintz was on record, but evidently was not regarded by Schintz, ¹⁰³ who conducted the proceedings, as constituting an encumbrance upon the property. After the sale was made, and on November 18, 1897, a deed was executed by Joseph Kucharski, the executor, alleged to be in pursuance of the sale at public vendue, to Kluczynski, the pretended purchaser, but

no money was paid by him for the deed. On the same day, wit, November 18, 1897, Kluczynski executed a deed and conveyed the premises to his sister, Katharina Obecny. No consideration was paid by Mrs. Obecny to her brother for the deed. Subsequently, on January 7, 1899, Mrs. Obecny and her husband conveyed the premises to the executor, Joseph Kucharski. No consideration was paid for this deed by Kucharski.

We regard all the proceedings in the probate court from June 11th down to the time of the execution of the deed by Kluczynski to Mrs. Obecny, as having been fraudulent and instituted for the purpose of depriving these appellees of their interest in this property. In fact there was no executor's sale, but merely a sham sale. The forms of the law were made use of to put a title in Kluczynski, the brother of Mrs. Obecny, who had executed a mortgage or trust deed upon the property of Schintz on June 10, 1897, more than five months before the executor's sale was made to him, as a pretended purchaser. The whole object of the proceeding was to get some sort of title in Kluczynski, as purchaser at the executor's sale, so as to connect him with the trust deed previously executed to Schintz. The conclusion is warranted by the evidence, that the real party in interest was Katharina Obecny, acting under the advice and direction of Schintz. Although the sale was nominally made to her brother, Kluczynski, yet it was really to her and for her benefit, as the property was deeded to her on the very day which the executor made a deed to Kluczynski. She filed the original petition, asking that the order which had discharged the executor and released her claim against the estate should be vacated.

¹⁰⁴ It is true that the petition for the sale of the property to pay the balance due upon the widow's award was filed in the name of the executor, Kucharski, but it was really filed by Mrs. Obecny and for her benefit, and the sale was made for her benefit. She was herself the owner of eight-twentieths of the property which was sold. In buying the property through her brother she was buying eight-twentieths of what already belonged to her. Counsel for appellant, in answer to the charge that the record nowhere shows any payment by Kluczynski to the executor of the eleven hundred dollars bid by him, says in his brief: "It may have been paid by the widow giving to such purchaser a receipt for the amount of her award and allowing the purchaser to turn such receipt into court." If the purchase money was paid by crediting the same, or a part thereof

upon what was due the widow upon her award, then the widow was the real purchaser, although the name of her brother was used as such purchaser. Such credit is only made at a public sale where the purchaser at the sale owns the debt for which the sale is made. The property was not sold to pay any debt or claim which was due to the pretended purchaser, Kluczynski. If there was a real sale, therefore, it was the duty of Kluczynski to pay the money and not to turn in a receipt from his sister for the amount due from her upon her award.

It being true, then, that this was a sale in fact to Mrs. Obecny, and that the petition to the court for the sale of the property to pay the balance due on the widow's award was really a petition by Mrs. Obecny, though filed in the name of the executor, it necessarily follows that there was no such service in this case upon the minors as gave the probate court jurisdiction to enter the decree of sale which was entered.

Where a petition is filed by an administrator or executor for the sale of real estate to pay debts, the heirs must be made parties, and must be served with summons. Section 103 of the act in regard to administration ¹⁰⁵ (1 Starr & Curtis' Annotated Statutes, 2d ed., p. 329) provides that "the service of summons shall be made by reading thereof to the defendant, or leaving a copy thereof at the usual place of abode, with some member of the family of the age of ten years and upward, and informing such person of the contents thereof, which service shall be at least ten days before the return of such summons." The minor appellees were made parties defendant to the petition for sale, and summons was issued against them. The return of the sheriff upon the back of the summons shows that he "served this writ on the within named Rosalia Szczepanski and Marianna Szczepanski by leaving a copy thereof for each of them at their usual place of abode with Katharina Obecny, a member of their family of the age of ten years and upward, and informing her of the contents thereof this ninth day of December, 1897." In other words, the summons was served upon these two minor devisees and heirs by leaving a copy thereof with their mother, who was not only a tenant in common with them in the ownership of the premises, but was proceeding adversely against them for the purpose of subjecting their interest in the premises to the payment of her widow's award, or rather who was trying through the machinery of the law to put the title to their interest in her brother, and in herself, for purposes of her own.

This court has held in a number of cases that, where a bill in chancery is filed against minors to subject their land to sale in the service of the summons by the delivery of a copy thereof to the complainant, informing him of its contents, will confer jurisdiction on the court as to the persons of the defendants, and the decree of sale rendered on such service will be void as to them: *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652; *St. Louis etc. Min. Co. v. Edwards*, 103 Ill. 472; *Lee v. Fox*, 8 Ill. 226; *Filkins v. O'Sullivan*, 79 Ill. 524; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. In the case at bar, Katharine Obecný, acting in the name ¹⁰⁶ of the executor, Kucharski, was the real complainant in this petition for the sale of this property. Indeed, in the petition which she filed for the vacation of the order of March 30, 1897, in her own name, she asked that the property might be sold. There was no service upon her minor children except by leaving a copy of the summons with her, the real though not nominal complainant in the petition, and stating the contents of it to her. We do not regard this service, under the decisions referred to, and upon principle, as sufficient. Her interest lay in the direction of keeping a knowledge of the filing of the petition from the very children for whom she accepted service. We are, therefore, of the opinion that the court acquired no jurisdiction over these appellees to enter the order of sale against their property.

The only persons who have taken the present appeal, and who assign errors here, are the appellants, who own the note and trust deed executed to Schintz, as trustee. The owners of the second trust deed to Winston are not here complaining. None of the other defendants below are here complaining. The only defendants who answered were the holders of the encumbrances. The executor, Kucharski, the alleged purchaser, Kluczynski, and Mr. and Mrs. Obecný, and Schintz, the trustee, were all defaulted below. The only parties, therefore, whose rights can here be considered, are those of the appellants, who purchased from Schintz the note and trust deed executed to him. The appellants, or their deceased ancestor, George Heppe, claim that they paid four thousand dollars for this mortgage to Schintz. It is very certain that he only applied about nineteen hundred dollars of it toward the erection of the new building upon the premises in question. The appellants cannot be regarded as purchasers in good faith without notice of the rights of the appellees in view of what has already been stated. The salient facts, which have been set forth, were shown by the rec-

ord in such a way that appellants were affected with ¹⁰⁷ notice of the scheme, which was concocted to deprive these children of their property. Appellants must have known, and could not have helped knowing, that, when they purchased the trust deed from Schintz, Kluczynski, the maker of that trust deed, had no title whatever to the property. Exactly when they made the purchase of the four thousand dollar note is not shown by the evidence. Counsel says in his brief that they purchased the note a few weeks after it was executed, but we find no evidence in the record to show that fact; but even if it was purchased after the sham sale to Kluczynski, there was enough upon the record to put them upon inquiry, so that, if they had made such inquiry, they could not have failed to ascertain the true character of the proceedings taken in the probate court, the effect of which was illegally and fraudulently to deprive these appellees of their property. In other words, the appellants purchased the trust deed to Schintz with notice of its real character.

The improvements, which were put upon this property, were put upon it by Mrs. Obecny, who owned an undivided interest as tenant in common with the appellees. This property was the homestead of the testator, the father of appellees, when he died, and was occupied as a homestead by the widow and these children when the transactions herein narrated occurred. Parties, purchasing the encumbrance had full notice of the rights of the appellees from their possession of the property. Where compensation is allowed for improvements, made by one tenant in common without the knowledge of the others, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. It is said here that the new building, which was erected by Mrs. Obecny upon these premises benefited the property of these appellees, and that they should be charged with their proportionate share of the cost of the improvements. The cotenant against whom such improvements are charged will be ¹⁰⁸ charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises: *Cooter v. Dearborn*, 115 Ill. 509, 4 N. E. 388; *Rowan v. Reed*, 19 Ill. 21. The master, whose report in this case was confirmed, found that the value of improvements on the lot in 1897 was fifteen hundred dollars, and that the value of the lot in 1897 was two thousand five hundred dollars, making a total amount of four thousand dollars for lot and improvements. We are not prepared to say that the evidence does

not sustain this finding of the master. Indeed, much of the testimony shows a greater value of the lot and improvements than the amount so found by him. But he also finds in his report that he is unable from the evidence to state the present value of said premises. Nor do we find any evidence in the record showing such present value. It is impossible to state, therefore, the amount which the improvements added to the value of the premises. This being so, it is impossible to charge the appellees with their proportion of the amount which, at the time of the partition, the improvements will have added to the value of the premises, if, under the facts of this case, they are justly chargeable with such proportion. As, however, this is a matter which concerns the appellees and their mother as between themselves, it is not necessary for us to pass upon it, as the mother has taken no appeal, and assigned no errors, and is not complaining of the decree below.

After a careful consideration of the whole record, we are unable to say that the chancellor below erred in holding that the appellees are each the owner in fee of an undivided six-twentieths of the lot described in the bill, free and clear of the lien of the trust deed, executed by Kluczynski to Schintz, as trustee, and also of the lien of the other trust deed herein before mentioned.

Accordingly, the decree of the court below is affirmed.

The Sufficiency of Service of Process on Minors is considered in *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757, and cases cited in the cross-reference note thereto; monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 492, on jurisdiction as affected by defects in the service of process.

The Vacation of Judgments and decrees on motion when not specially authorized by statute is the subject of a monographic note to *Furman v. Furman*, 60 Am. St. Rep. 633-663. Relief in equity from judgments other than by appellate proceedings is the subject of a monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-261. And negligence as a bar to such relief is the subject of a monographic note to *Payton v. McQuown*, 53 Am. St. Rep. 444-453. A judgment free from jurisdictional defects cannot ordinarily be set aside by a court of law after the term when rendered and the time prescribed by statute; a court of equity, however, may have such power: *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; *Larson v. Williams*, 100 Iowa, 110, 62 Am. St. Rep. 544, 63 N. W. 464, 69 N. W. 441. A judgment void on its face may be vacated at any time: *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739.

Compensation for Improvements made by one cotenant on the common property is discussed in the monographic notes to *Ward v. Ward*, 52 Am. St. Rep. 924-941; *Cleland v. Clark*, 81 Am. St. Rep.

185-187. At the common law it seems one cannot charge his cotenant with the value of improvements made upon the premises, unless they are made with his consent: *Gjerstadengen v. Hartzell*, 9 N. Dak. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, 46 N. E. 307, 86 L. R. A. 758. But see *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703.

MALLIN v. WENHAM.

[209 Ill. 252, 70 N. E. 564.]

ASSIGNMENT OF WAGES to be Earned in future under an existing contract of employment for an indefinite time is not opposed to public policy, and is valid if made for a valuable consideration and without fraud. (p. 234.)

ASSIGNMENT OF WAGES—Bankruptcy.—A discharge in bankruptcy does not release a prior assignment of wages to be earned in future, nor destroy the lien created by such assignment. (p. 236.)

BANKRUPTCY—Effect of Discharge in bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a valid lien has attached and which is not expressly annulled by the bankruptcy statute. (p. 238.)

H. H. Reed, A. R. Urion and A. F. Reichmann, for the appellant.

M. Ives and G. I. Haight, for the appellee.

234 **RICKS, J.** In respect to the first proposition mentioned, the authorities are ample and conclusive to the effect that an assignment of wages to be earned in the future, under an existing employment, is valid. This precise question has frequently been passed upon by the courts of the different states and of England, and, so far as we are advised, the courts of dernier ressort have, without exception, upheld such contracts where they have been for a valuable consideration and untainted with fraud. The authorities are to the effect that it is not necessary that there be an express hiring for a definite time, but the existence of the employment at the time of the assignment is sufficient. In the case at bar, appellant was, and had been for some time previous, in the actual employ of Armour & Co., at a fixed price per month. It is true such employment was not of any definite duration, and appellant might abandon the same at any time or his employer might discharge him. The subject matter of the contract had but a potential existence, but it was such a property right as might legally be disposed of. The re-

marks of the court in *Thayer v. Kelley*, 28 Vt. 19, 65 Am. D. 220, are very pertinent to the subject in hand, and we here quote them: "When the debtor is in the actual employment of another and is receiving wages under a subsisting engagement, an assignment by him of his future earnings may be made, not only for the security and payment of a present indebtedness, but for such advances as he may find it necessary to obtain." ²⁵⁵ This principle is fully established by the cases to which we were referred: *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *Brackley v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Field v. Mayor of New York*, 6 N.Y. 187, 57 Am. Dec. 435; *Emery v. Lawrence*, 8 Cush. 141. The debtor in this case, at the time of his assignment to the claimants, was in the actual employment of the trustees under a subsisting contract, at a given price per day, and had in that manner labored for them for some two or three years previous; and though he had the right to leave their employment and they had the right to discharge him, yet so long as that relation existed between them we think the authorities are satisfactory in holding that the claimants were entitled to receive, under that assignment, his accruing wages in payment of the advances which they had made." In support of the above doctrine reference is made to the following cases: *Kane v. Clough*, 36 Mich. 42, 24 Am. Rep. 599; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867.

The second proposition urged by appellant is, that the assignment in question is against public policy, and for that reason ought not to be upheld. This question was raised in the case of *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 20, 14 Atl. 936, and the court there held such an assignment did not contravene public policy, and quoted with approval from the case of *Smith v. Atkins*, 18 Vt. 461, in which case it was said: "It is argued that such contracts are so much against public policy that they ought not to be supported, but we think they are rather beneficial, and enable the poor man to obtain credit when he could not otherwise do it, and that without detriment to the creditors." And further, in the *Edwards* case the court say, speaking of an assignment of wages to be earned in the future: "It cannot be said to contravene public policy." *Smith v. Atkins*, 18 Vt. 461. The consideration was not unmeritorious, and the assignment was not given to delay creditors." And further: "The true doctrine seems to be, that

make a grant or assignment ²⁵⁶ valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments, not only to choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only"—citing numerous cases.

Appellant, in this connection, calls attention to the statutes and exemption laws of this state, and insists that the liberal provisions made by the legislature for the indigent and poorer classes indicate the adoption of a broad and liberal public policy toward the classes named, and that it is the duty of this court to so construe the law that the class and individuals so favored by the statute shall be compelled to accept of its beneficent provisions. Such is not the province of this court. The citizens of the state have a right to contract, and there is no law forbidding one from selling or assigning any property he may have. A person has the same right to assign his wages that he has to mortgage his homestead or to mortgage personal property that is exempt from execution. The statute provides liberal exemptions, of which a person has the right to avail himself if he so desires, but if he does not, the courts are powerless to help him. The duty of the courts in instances of this kind is well laid down in the case of *Carroll v. City of East St. Louis*, 67 Ill. 568 (on p. 579), 16 Am. Rep. 632: "It is the legislative and not the judicial power in the state that must control and give shape to its public policy. That power does not pertain to the courts. They can only observe that policy and apply it to cases as they arise, without changing or obstructing it." Also in the case of *Frorer v. People*, 141 Ill. 171, it was said (p. 185, 31 N. E. 395, 399, 16 L. R. A. 492): "Other instances of statutory regulations of private rights are, in lien laws in favor of homesteaders, mechanics, etc.; limitation laws; the statute of frauds, and other statutes relating to evidence; laws in regard to pleadings; exemption laws and ²⁵⁷ insolvent laws. But these all relate, not to the power to contract in regard to matters of general right, but to the remedy for the enforcing of contracts, as to which the legislature may make such regulations as the public welfare seems to demand, so long as, under pretense of regulating the remedy, it does not impair the right itself." We also indorse the doctrine laid down in *Greenhood on Public Policy* (pages 116, 117), as follows: "The power of the courts to declare a contract void for being in contravention of

sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial—not theoretical or problematical. He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state.”

The assignment of appellant's wages was simply a lien on the same so long as he remained in the employ of Armour & Co. and until the indebtedness secured thereby was satisfied. Should appellant quit his employment with Armour & Co. he would by that act destroy the assignment as security, or should he pay his debt to Wenham he could not be injured in any way by his assignment. Thus it will be seen that there is but little to support appellant's contention that the assignment was a harsh and unconscionable bargain. In the case of *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599, the assignor made an assignment “of all the wages that might thereafter become due to him from the defendants,” and the transaction was upheld. In the case of *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115, the assignment was “for all ²⁵⁸ sums of money that may now be due to me from the Chicopee Manufacturing Company, etc., for labor performed in their service,” and the court, in concluding its opinion in that case, say: “This was a proper subject of contract or agreement, and when the labor was performed the company were bound to pay according to their undertaking.”

The question of usurious interest is not an element in this case, but if relief is desired to be had against such, appellant has his proper remedy. The record, however, discloses that appellant has obtained three hundred and forty-two dollars in actual cash which he has not repaid.

We cannot see that there is anything intrinsically vicious in an assignment of wages. The assignor, in such case, simply draws upon his future prospects to supply present needs, which may be of the most urgent and pressing character. There is no law in this state to prevent a poor person from mortgaging or pledging any or every article of property he possesses, as

security for his debts, and such a privilege may be of great value. On the whole, we see no reason or right for holding the assignment in question here void as against public policy.

It is next insisted by appellant that because of bankruptcy proceedings had by him the assignment is unenforceable. This position, we think, is wrong. The only effect of a discharge in bankruptcy is to suspend the right of action for a debt against the debtor personally. It does not annul the original debt or liability of the debtor. In *Bush v. Stanley*, 122 Ill. 406, the court said (p. 416, 13 N. E. 249, 253): "The discharge is analogous, in effect, to the statute of limitations, in so far as it does not annul the original debt, but merely suspends the right of action for its recovery." In *Pease v. Ritchie*, 132 Ill. 638, this court further said (p. 646, 24 N. E. 433, 434): "It is no doubt true that appellant's discharge in bankruptcy operated as a bar to any action which might be brought to recover any debt or obligation existing at the time he was declared ~~and~~ a bankrupt, and after-acquired property was exempted from being taken in satisfaction of any such debts. But if any creditor had a lien or an equitable claim, by mortgage or otherwise, upon any property of the bankrupt, such right or rights would remain unaffected by the proceedings in bankruptcy."

In the case of *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936, an employé had given an assignment of his wages. Subsequently he filed a petition for discharge under the insolvent law of the state, and in its opinion the court there said: "The rule laid down by Judge Story in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673, seems to have been very generally held by all chancery courts in this country. He says: 'It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice in bankruptcy.'" The language above quoted is also quoted with approval in the case of *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719.

In the case of *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498, it was held that a creditor who has not proved his debt in bankruptcy is still, after discharge of the debtor, a sub-

sisting creditor against him to the extent of his debt, which he is entitled to have paid out of the proceeds of a policy of insurance on the life of the debtor assigned to him by the debtor and beneficiary to secure subsisting demands in favor of the creditor, and it was said that the discharge did not extinguish the debt or demand, but that the effect of such discharge is analogous to that of the bar of the statute of limitations, which only goes to bar a creditor's remedy and does not wipe out the debt.

²⁶⁰ In discussing the right of a creditor to maintain an action on a collateral agreement as security after the debt so secured has become barred by the statute of limitations, it was said in *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783: "If there is an actual pledge and the debt becomes barred, this does not give to the debtor a right to reclaim his pledged property. The debt is not extinguished—the statute only takes away the remedy: *Hancock v. Franklin Ins. Co.*, 114 Mass. 156. In case of a mortgage of real or personal estate the security is not lost though the debt be barred: *Thayer v. Mann*, 19 Pick. 535. The rule is the same where there is a lien: *Spears v. Hartly*, 3 Esp. 81; *Higgins v. Scott*, 2 Barn. & Adol. 413; *In re Bromhead*, 16 L. J. Q. B. 355. And there appears to be no good reason why an independent collateral agreement, given by way of guaranty or other security, should not outlive the remedy upon the debt which it was given to secure, under proper circumstances."

Section 67d of the bankruptcy law of 1898 (30 Stats. 564, U. S. Comp. Stats. 1901, p. 3449), provides: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." In this case there is no question of notice of the assignment, nor was it such a one as required any notice to be given, consequently we think the assignment in question was one "not affected by this act."

We think the decided weight of authority is to the effect that a discharge of a debtor in bankruptcy is but a personal release, and does not exonerate the effects of the debt to which a valid lien has attached and which is not expressly annulled by the provisions of the bankruptcy act.

The assignments of error, we think, are without merit, and the judgment of the appellate court should be and is affirmed.

An Assignment of Wages to be earned in the future may be valid: *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 986. Compare *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651; *Robinson v. McKenna*, 21 R. I. 117, 79 Am. St. Rep. 793, 42 Atl. 510.

SUPREME LODGE KNIGHTS AND LADIES OF HONOR v. MENKHAUSEN.

[209 Ill. 277, 70 N. E. 567.]

BENEFIT SOCIETIES—Murder of Insured.—Although the beneficiary named in a certificate of a benefit insurance society, who murders or feloniously takes the life of the insured, cannot recover the benefit from such society, yet this does not release it from the payment of such benefit to anyone, in the absence of a contract provision to that effect. (p. 240.)

BENEFIT SOCIETIES—Murder of Insured.—Heirs at Law of an insured member of a benefit society, who is murdered by the named beneficiary are entitled, when named by statute as within the class of eligible beneficiaries, to recover such insurance, nothing to the contrary appearing in the contract of insurance, or in the state law. (p. 242.)

BENEFIT INSURANCE—Parties to Action to Recover.—If the statute determines the persons entitled to the insurance on the life of a murdered member of an insurance benefit society, suit to recover such benefit is properly brought in the names of such persons, and need not be brought by the administrator of the estate of the deceased member. (p. 242.)

J. M. Hamill and Ashcraft & Ashcraft, for the appellant.

Turner & Holder, for the appellees.

230 SCOTT, J. The beneficiary named in a benefit certificate who feloniously takes the life of the insured cannot recover from the fraternal beneficiary society, and it is now urged that public policy also requires us to hold that in such a case there can be no recovery by any person whosoever against such a society, and that under such circumstances not only is the certificate void, but the obligation of the society to pay to anyone whosoever is canceled and rendered absolutely inoperative. The cases relied upon by appellant are of two classes: 1. Where the insured was murdered by the beneficiary and suit was brought by the criminal or someone claiming

through him; and 2. Where the insured was executed in pursuance of the sentence of a court of competent jurisdiction for a crime committed by him or her. Neither class of cases is a point here. The only reason in favor of appellant's contention that seems to us of weight is found in the fact that the beneficiary might be incited to commit murder by the fact that unable to collect the benefit himself it would be payable to some other person or persons in whose welfare he was interested. Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof becomes well-nigh inconsequential. But even were it otherwise, if the rule suggested by appellant ²⁸¹ were established, it is perceived that the society would then profit by the murder, and an incentive be created for the destruction of the life of the insured to the interest of the insurer might be advanced. The contract between the society and the insured contained no provision relieving the society from liability in the event that she was murdered by the beneficiary, and public policy does not require us to read such a condition into the agreement. If it did, we would also require us to hold that the beneficiary could not recover on the policy if the insured was murdered by another acting independently of and against the desire of the beneficiary, because it is within the realm of possibility that such other without the connivance or knowledge of the beneficiary, might commit the crime solely for the purpose of enriching the latter. If societies of the character of appellant desire to be protected from such contingency, that object must be accomplished by a condition to that effect written into their contracts, failing which the law will not absolve them from liability: *Cleaver v. Mutual Reserve Fund Life Assn.*, 1 Q. B. 147; *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, N. W. 800, 51 L. R. A. 141. In the absence of a contract to that effect, public policy will not permit the society to appropriate unto itself the fund which it has agreed to pay, merely because the life of the insured has been unlawfully taken.

It is suggested, however, that this certificate was payable alone to Gustav Menkhause, and that no recovery can be had thereon except by him or by those claiming through him, and that as he cannot recover no one can recover on the certificate. We do not regard this as a suit upon the certificate. A careful examination of the declaration leads us to conclude that it is

suit to recover the benefit, one thousand dollars, which the appellant undertook, by its constitution and by-laws, to pay to the person, within certain classes, who should be designated by Elizabeth Menkhause, and that the action is upon the obligation of appellant as evidenced by its constitution ²⁸² and by-laws, and not upon the certificate. These rules or laws of this organization recite its purpose to be the establishment of a relief fund, from which, upon the death of a member, a benefit shall be paid to the person designated by the member in the certificate, and that such benefit may be made payable by the member to the wife or husband, the children, grandchildren, parents, certain other persons of the whole or half blood, or the next of kin who would be distributees of the personal estate of the member, in the order above named.

By the act of 1887, which was in force when the certificate in question was issued, it was provided, in substance, that societies of the class to which appellant belongs might be organized for the purpose of furnishing benefits, upon the death of a member, "to the widow, heirs, relatives, legal representatives or the designated beneficiaries of such deceased member": Laws 1887, sec. 1, p. 205. By the act of 1893, which became effective a few months after the issuance of this certificate, it was provided, so far as material here, that payment of death benefits should be made only to the "families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member": Hurd's Stats. 1895, c. 73, par. 258. It will be observed that by the spirit of each of these three enactments the children of the deceased would stand next in order after the husband or wife.

"Upon the death of a member, where the person claiming to be his designated beneficiary is outside of the classes eligible as beneficiaries of his insurance, the member's heirs at law, who are within such classes, are entitled to the insurance. There being no selection of a beneficiary authorized to take, the fund goes to them: *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187"; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065.

We think the correct view to take is, that Gustav Menkhause, by his act in taking the life of his wife, ²⁸³ placed himself outside the classes from among whom she might designate a beneficiary, and he could not thereafter take the fund, or any part thereof, either as the beneficiary named in the certificate or as heir or heir at law of his wife. The situation, so far

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as his rights and those of appellees and appellant are concerned, we think is precisely the same as though, after the issuance of this certificate, he had been divorced from Elizabeth Menkhausen and she had thereafter died without having any alteration made in the certificate. Under such circumstances he would have no interest in the certificate, but the proceeds thereof would be payable to the heirs of the insured, nothing to the contrary appearing in the certificate, the constitution and by-laws of the order or the laws of the state under which it operates: *Tyler v. Odd Fellows' Mutual Relief Assn.*, 145 Mass. 134, 13 N. E. 360; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Order of Railway Conductors v. Koster*, 55 Mo. App. 186.

In *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800, 51 L. R. A. 141, and in *Cleaver v. Mutual Reserve Fund Life Assn.*, 1 Q. B. 147, growing out of the Maybrick murder, the same question was presented as is now before us. In both cases it was held that the fact that the beneficiary had murdered the insured did not cancel the obligation of the insurer, and in both cases the administrator of the insured was allowed to recover on the theory that the insurer held the fund in trust for the estate of the deceased; and in the case at bar it is argued that if there could be a recovery at all, it must, under the authority of these cases, be in the name of the administrator of the estate of Elizabeth Menkhausen. It is very evident that neither the constitution and by-laws of appellant nor the laws of this state contemplate the payment of a benefit of this character to the administrator of the member. The purpose is to pay it directly to the beneficiary, whoever that may be, without the intervention of administration; and where, as here, the law determines the persons who are entitled to the fund, the ²⁸⁴ suit is properly brought in the names of such persons, and in this case there is no occasion for a resort to equity.

Rule 15 (47 N. E. vii) of this court indicates the manner in which a brief and argument should be prepared for presentation here. Counsel on both sides of this controversy have failed to observe that rule. A compliance therewith is materially helpful in the consideration of causes in this court. It should be followed in every instance.

The judgment of the appellate court will be affirmed.

If the Beneficiary in a Life Insurance policy kills the insured, he cannot recover from the insurance company; but the insurance money forms a part of the estate of the insured, and may be recovered by his administrator, as though no beneficiary had been designated: Schmidt v. Northern Life Assn., 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800, 51 L. R. A. 141.

STEBBINS v. PETTY.

[209 Ill. 291, 70 N. E. 673.]

DEEDS—Cancellation—Agreement for Support.—If a grantor conveys land and the consideration is an agreement by the grantee to support, maintain, and care for the grantor during the remainder of his or her natural life, and the grantee refuses or neglects to comply with the contract, the grantor may, in equity, have a decree rescinding the contract and deed and reinvesting him with the title to the land, on the ground that the contract was fraudulent in its inception. (p. 243.)

DEEDS—Agreement for Support—Cancellation as Against Grantee's Heirs.—If a grantee performs her agreement to support a grantor during his lifetime, given as a consideration for his deed, the failure of the minor heirs of such grantee to perform the agreement after her death is not ground for cancellation of the deed, unless there is an unsatisfied judgment in some prior proceeding requiring such heirs to perform the grantee's agreement. (p. 245.)

DEEDS FOR SUPPORT—Reservation of Lien—Foreclosure.—If a deed executed in consideration of the grantee's agreement to support the grantor during his lifetime, reserves a lien on the land to secure performance of the agreement, the grantor may foreclose such lien against the grantee's heirs who fail to perform such agreement. (p. 245.)

Matthews & Anderson, for the appellant.

J. Orr, W. E. Williams, guardians ad litem, and Williams & Grote, for the appellees.

203 SCOTT, J. It has been frequently held in this state that where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain and care for the grantor during the remainder of his or her natural life, and the grantee neglects or refuses to comply with the contract, the grantor may, in equity, have a decree rescinding the contract and setting aside the deed and reinvesting the grantor with the title to the real estate: Frazier v. Miller, 16 Ill. 48; Oard v. Oard, 59 Ill. 46; Jones v. Neely, 72 Ill. 449; Kusch v. Kusch, 143 Ill. 353, 32 N. E. 267; Cooper v. Gum, 152 Ill.

471, 39 N. E. 267; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Fabrice v. Von der Brelie, 190 Ill. 460, 60 N. E. 835. A careful examination of these cases leads to the conclusion that the intervention of equity in such cases has been sanctioned in this state on the theory that the neglect or refusal of the grantee to comply with his contract raises a presumption that he did not intend to comply with it in the first instance, and that the contract was fraudulent in its inception, wherefore a court of equity will not permit him to enjoy the conveyance so obtained.

It appears from this bill that the grantee herein complied with her contract during her lifetime. Nothing that she did, therefore, raises any presumption that she was animated by any fraudulent purpose in accepting this conveyance. Joseph Petty, her husband, has no present interest in this real estate, as the grantor reserved to himself a life estate therein. Her heirs are the appellees, ²⁰⁴ Estill Miller Petty and Marion Luther Petty, aged, respectively, three and six years. Will the failure of these minor children to properly maintain the grantor after the death of the mother lead to the conclusion that the contract was fraudulent in the beginning?

We are referred by appellant to the cases of Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768, Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156, Glocke v. Glocke, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458, Wanner v. Wanner, 115 Wis. 196, 91 N. W. 671, and Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613, as authorities for the proposition that appellant has the same remedy in equity against these minors that he would have had against their mother had she survived and refused or neglected to perform her contract. None of these cases are cases where the rights of the grantee had passed to minors.

In Cree v. Sherfy, 138 Ind. 354, 37 N. E. 787, however, the grantee, until his death, supported the grantor, and thereafter the grantor obtained relief of the character here sought against the minor heirs of the grantee. In Indiana, as well as in the other states, excepting Illinois, where the courts of last resort have considered contracts of this character, so far as we have been referred to their decisions by appellant, the relief is placed on the theory that the agreement to maintain will be read into the deed as a condition subsequent, and that the latter instrument will be construed as though the granting portion thereof were followed by words stating that it is made upon condition

that the grantee support and maintain the grantor so long as the latter lives. Under such a construction it is apparent that whenever support and maintenance were not furnished to the grantor, no matter what occasioned the default, unless performance was excused by him, he could enforce the condition. We have never so construed these deeds.

In the case of *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511, where the father conveyed a quarter section of land to his son in consideration of natural love and affection and two hundred dollars ²⁹⁵ per year to be paid to the father as long as he lived, this court expressly refused to hold that the conveyance was upon a condition subsequent, saying: "The words 'upon condition' do not occur, and there are no other words of equivalent meaning." No reason appears why a different construction should be given by us to a deed which requires support and maintenance to be thereafter furnished instead of money to be thereafter paid.

These minor children, having no legal guardian, in the absence of some legal proceeding resulting in a decree or judgment providing for the enforcement of the contract of their mother against their property, which remains unsatisfied, cannot be held, in equity, either to have refused or neglected to comply with the contract of their mother. They are peculiarly the wards of a court of chancery. We must recognize the fact that without the aid of a court of competent jurisdiction their property cannot be applied to the satisfaction of this obligation, nor can they themselves elect to refuse to perform this contract; nor, in the absence of a decree or judgment against them, can it be said that they have negligently failed to comply with the terms of the agreement. It will scarcely be urged that the failure of two children of tender years to furnish support to the grantor, under the circumstances disclosed by this bill, raises a presumption that the contract had its inception in a fraudulent purpose on the part of their mother.

The grantor is entitled to support and maintenance as in the lifetime of Emily Petty. A lien securing the same is reserved by the deed, and he has the undoubted right to foreclose that lien if he so elects.

The decree of the circuit court will be affirmed.

A Conveyance by Parents to a son in consideration of his covenant to support them may be rescinded by a court of equity, upon a breach of the covenant: See the monographic note to *Ecroyd v. Coggeshall*,

79 Am. St. Rep. 764. Consult, also, *Lewis v. Lewis*, 74 Conn. 630; 92 Am. St. Rep. 240, 51 Atl. 854; *Richter v. Richter*, 111 Ind. 456; 12 N. E. 698; *Leonard v. Smith*, 80 Iowa, 194, 45 N. E. 762; *Mansfield v. Mansfield*, 92 Mich. 112, 52 N. W. 290; *Woolcott v. Woolcott* (Mich.), 95 N. W. 333; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671.

BEIDLER v. KING.

[209 Ill. 302, 70 N. E. 763.]

PARTY-WALLS—Construction of Agreement for Repairs.—

A party-wall agreement, providing that if repairs are necessary after one of the parties has used or paid for his portion of the wall, the expense shall be borne equally by the parties to the extent that they are each using the wall, imposes no obligation on the first-named party to repair or pay for repairs to any portion of the wall not used by him. (p. 247.)

PARTY-WALLS—Partial Destruction—Liability for Dangerous Condition.—If a party-wall is built partly on the land of an adjoining owner, its partial destruction and weakening by fire do not divest the builder of his interest in the land of such adjoining owner so as to render the latter the sole owner of that part of the wall standing on his land, and make him liable for its dangerous condition. (p. 249.)

PARTY-WALLS—Liability for Dangerous Condition.—A part owner of a party-wall who negligently permits it to stand after its partial destruction and weakening by fire is liable to another part owner who is using part of the wall for damages resulting to the latter from a falling of another portion of the wall in which he has no interest and is not using. (p. 250.)

NEGLIGENCE—Dangerous Standing Walls—Notice of.—An adjoining owner, who has notified the owner of a dangerous standing wall of its insecure condition, is not guilty of contributory negligence in not taking means to prevent such wall from falling, to his injury and resulting damage. (p. 250.)

TRIAL.—Instruction Given, stating correct abstract propositions of law, are not ground for reversal of the judgment, unless they tend to mislead the jury. (p. 250.)

PARTY-WALLS—Right to Prevent Injury from Falling of.—If a party-wall agreement gives to one party no right to use or deal with any portion of the wall until he shall have paid one-half of the cost thereof, he has no right to go upon the adjoining premises for the purpose of bracing a portion of the wall, not used or paid for by him, to prevent it from falling upon his property. (p. 251.)

TRIAL—Instructions.—The fact that an essential element is lacking in one instruction is not ground for a reversal of the judgment, if such element is supplied by other instructions. (pp. 252, 253.)

W. L. Lacey, for the appellants.

A. Humphrey and T. Bates, for the appellee.

307 SCOTT, J. The principal controversy in this case is determined by a construction of the party-wall contract. Appellants' position is, that after appellee had paid for and used a portion of the party-wall she was then liable, under that contract, for a portion of the repairs to the entire wall, and that, it being her duty to assist in keeping the entire wall in repair, she cannot recover damages resulting from a failure to repair the party-wall. The language of the contract in reference to repairs is as follows: "And the parties hereto further covenant and 308 agree, that if it shall become necessary to repair or rebuild any portion of said party-wall or walls before said party of the second part shall use or pay for her portion of the same, the expense or cost of such repairing or rebuilding shall be borne by the said first party; and further, if it shall become necessary to so repair or rebuild after the said party of the second part shall have used or paid for her portion of said wall, then and in that event the cost of such repairing or rebuilding shall be borne equally by the parties hereto, to the extent that they are each using said wall."

Under the above contract it is said that appellee was bound to pay her share of any repairs to any portion of said party-wall in the proportion which the part of the wall that she had paid for bears to the entire wall; that is, if she was using the north one-half of the wall or had paid one-half of the cost thereof, she would then have paid for and would have been the owner of the one-fourth part of the entire wall, and if the south half of the wall needed repairs she would be liable for one-fourth of the expense thereof, even though she owned no part of that half of the wall. The intention of the parties was that she should pay for this wall and use the same in such portions thereof as she might elect from time to time, and we think the contract simply means that she should be liable for repairs to that portion of the wall for the one-half of which she had paid. The language is, "the cost of which repairing or rebuilding shall be borne equally by the parties hereto, to the extent that they are each using said wall." This means that each shall pay one-half of the cost of the repairs to that portion of the wall which is being used by both; that throughout that extent of the wall which was used by both, each should bear one-half of the expense of repairing or rebuilding. The preceding language plainly shows that Beidler was to pay all the necessary expenses of repairing or rebuilding that portion of the wall which ap-

pellee ³⁰⁹ had not used and to the cost of which she had contributed nothing.

In *Mickel v. York*, 175 Ill. 62, this court said (p. 70, 51 N. E. 848, 851): "The contract in this case expressly provides that plaintiff, before making any use of or joining any building to the wall, shall pay or secure to the defendant York the full moiety or one-half part of the value of the said party-wall, or so much thereof as shall be joined thereto or used, which value shall be the cost price at the time when such wall is to be used. The contract expressly provides, further, that York shall build that wall. By the terms of that contract York retained the ownership of what he had placed upon the plaintiff's land until he should be paid for it, and he had a right to have it supported on the land of plaintiff under this contract. The wall having been built on the plaintiff's land under this agreement, which amounts to a license with an interest, is not thereby incorporated and lost in the land or lot, but remains a separate property, still belonging to the builder until he is paid therefor. York, therefore, was the owner of this wall, and was liable for any and all damage for failing to maintain it in a safe condition."

In the case at bar appellants were the sole owners of the entire wall, except that part thereof which was being used by appellee, and the rights and liabilities of the parties were the same with respect to that portion of the wall of which appellants were the sole owners as they would have been with reference to the entire wall had appellee neither purchased nor used any part thereof. The cases referred to by appellants, of the class of *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683, holding that where the same duty rested upon two parties to make repairs both may be said to be guilty of negligence if the repairs be not made, are not in point.

It is then urged that as this contract does not expressly provide for rebuilding the "whole" of this wall it cannot be rebuilt under this party-wall contract, and ³¹⁰ that upon its usefulness as a party-wall being destroyed by the fire, it was as though the wall itself was absolutely and entirely destroyed, and appellee became the owner of that portion thereof which stood on her land, and that consequently the injury resulted from her failure to care for her own property. It is unnecessary here to determine whether the wall can be rebuilt under this contract as a party-wall.

The contract contains this language: "Provided always, nevertheless, and on the express condition that the said party of the second part, her heirs, administrators, executors or assigns, as aforesaid, before proceeding to join any building to the said party-wall, or to any part thereof, and before making use thereof or breaking or cutting into the same, shall pay unto the said party of the first part, his heirs or assigns, the full moiety or one-half part of the full value of the whole of said party-wall if used, or of such portion thereof as shall be used as a party-wall by said party of the second part, which value shall be the cost price at the time when such party-wall is to be used by said party of the second part." We think this language applicable to this wall so long as it stood, and that the owner of the wall would not be deprived of his title to that portion thereof which stood on the ground of appellee merely by the fact that the wall had become so weakened by the fire as to be no longer fit for the purpose for which it was originally built.

So construing this contract, we come now to a consideration of the error assigned upon the refusal of the court to instruct the jury to find for the defendants at the close of all the testimony. In support thereof it is said that there is no evidence of negligence on the part of the defendants, and that there is no testimony showing the exercise of due care by the plaintiff.

The general rule is, that where a fire has occurred in a building, destroying the inner portion of the building and leaving the walls, if the owner negligently permits ³¹¹ the walls to remain standing, and they thereafter fall, the owner of the wall is liable to the adjacent owner for the resulting damage: 1 Wood on Law of Nuisances, sec. 225; Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227; Mickel v. York, 175 Ill. 62, 70, 51 N. E. 848, 851.

In this case the attention of appellants was called to the condition of this wall immediately after the fire, on the morning of October 17, 1899. They did not begin the work of taking down the wall until the evening of October 20, 1899, and then only with a force of three men, when a force greater in number than fifteen could have been used in the work. The evidence is that the wall could have been taken down in from four to five days with a sufficient force of workmen—that is, with as many men as could have worked thereon. It also appears that after the work of taking down the wall began, it was suspended one day under the direction of the fire department of the city

of Chicago. It fell on the 28th. It is apparent that if a force of men in proper numbers had been put to work on the wall at the earliest possible moment, it would have been entirely removed before the day on which it fell. The longer the wall stood the greater was its inclination to the east. Had a stronger force been at work earlier, the upper portion of the wall would have been sooner removed, and the tendency of the wall to lean to the east would thereby have been lessened. Some evidence was offered tending to show the difficulty about securing men to work on this wall on account of the danger of its falling. This evidence does not show such an effort to secure the necessary men to take down this wall as the emergency required of men of ordinary prudence. A small force was kept continually at work, except on the day when they were interfered with by the fire department. We are not able to say from the evidence, as a matter of law, that by the exercise of measures such as a reasonably prudent man would have used, men sufficient in number to take the wall down at the earliest possible moment could not have been obtained. ³¹² The evidence tended to show negligence on the part of appellants.

It is then urged that inasmuch as appellee took no steps herself to prevent the wall falling, beyond notifying appellants of its dangerous condition and demanding that they remove it, she was guilty of contributory negligence. Laying aside for the moment the question of her right to do anything with the wall, we think she was entitled to assume that the appellants, whose attention has been called to the condition of the wall, would perform their duty in respect thereto, and we cannot therefore hold, as a matter of law, that she was guilty of contributory negligence.

The peremptory instruction was properly refused.

The eleventh instruction given on the part of appellee is an abstract proposition of law. By it the jury are informed that until Emily A. King exercised her right to pay for and use some portion of the wall, Jacob Beidler and his heirs were the owners and had exclusive control thereof, and that she had no right, title or interest in the said wall, or any part thereof. This instruction might better have been made to apply alone to that part of the wall to the cost of which she had not contributed and which she was not using. This instruction, however, is an accurate statement of the law, and while it might properly have been refused, we do not think it could have misled the jury, and unless it appears to the court that such instructions tend to mis-

lead the jury, the judgment will not be reversed on account of the giving thereof: *Healy v. People*, 163 Ill. 372, 45 N. E. 230.

Appellee's eighteenth instruction was to the effect that if defendants' portion of the wall, as a result of their negligence, fell and pulled over a portion of the wall which plaintiff had paid for and was using, which portion last mentioned would not otherwise have fallen, she may recover the entire amount of damages sustained by her, resulting from the fall of the entire portion of the ³¹³ wall which fell upon her premises. It is said that this instruction ignores the fact that Mrs. King's part of the wall may have been weak, defective and out of plumb and may have contributed to the fall. We do not think it objectionable on this account, as it plainly appears from the evidence that the portion of her wall which came down in the catastrophe was carried to the east, prior to the fall, by the progress of the wall above it in that direction.

Instructions numbered 12, 13, and 14, and one given by the court of its own motion, are all criticised for the same reasons. No. 13 is in the following language: "The court instructs the jury that as a matter of law the plaintiff had no right to go on or touch the portion of said east wall of said building not paid for by her, for the purpose of preventing the same from falling, or for any other purpose."

The first and second objections to these instructions are disposed of by what we have already said. The third is, that appellee had the right to enter upon the premises, if necessary, and also upon any part of the wall, for the purpose of bracing the wall to prevent the same from falling upon her property. We are referred in this connection to the case of *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877. That case deals with the right of entry for the purpose of reinforcing a party-wall under the contract then before the court, and the contract there is held to give one party the right of entry upon the premises of the other for the purpose of strengthening the foundation of the wall. No such provision is found in the contract in the case at bar. The portion of the wall to which these four instructions applied was the sole property of appellants. The contract gave to appellee no right to use or deal with the wall, or any portion thereof, in any manner, until she should have paid one-half the cost thereof. These instructions were correct.

Appellants rely upon the case of *Factors etc. Ins. Co. v. Werlein*, 42 La. Ann. 1046, 8 South. 434. That case, however, turns upon ³¹⁴ certain provisions contained in the Louisiana

code which are not found in our statute, and the case is therefore of no assistance in determining this question.

The objection urged to instruction No. 15 is, that it advised the jury that Mrs. King was entitled to recover if the wall fell through the negligence of the defendants, and omitted the qualification that it must appear that she was in the exercise of due care. This question does not arise upon this instruction, which is to the effect that the fact that Emily A. King paid for and used a portion of the east wall does not bar a recovery for damages occasioned by the fall of another portion of that wall resulting from negligence on the part of the defendants. This objection is also made to instruction No. 18, which we have heretofore considered in regard to a different complaint made to the action of the court in giving the same.

In the instruction given by the court of its own motion, in which all the elements which must be found by the jury to warrant a verdict in favor of the plaintiff are stated, they are told that to warrant a recovery they must "find that the plaintiff was without fault," and in an instruction given on the part of the defendants is this language: "And if the jury believe, from the evidence, that the plaintiff was guilty of negligence contributing to the injury, then the plaintiff cannot recover and the jury should find for the defendants." It is a familiar rule that the instructions must be considered as a series. In considering the same objection which is now made, this court in *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, said (p. 591, 38 N. E. 946, 949): "3. Error in the instructions given for the plaintiff is complained of. The first instruction is objected to upon the ground that it does not require the exercise of ordinary care by the plaintiff. This is true if the instruction is considered by itself, but all the instructions, both those given for the plaintiff and those given for the defendant, must be considered together as ³¹⁵ one charge. Upon examining the instructions given for the defendant, we find that five of them, distinctly and in express terms, say to the jury that the plaintiff cannot recover unless he shows that at the time of the injury he was in the exercise of ordinary care. Plaintiff's first instruction, although unnecessarily announcing the now obsolete doctrine of comparative negligence, is not inconsistent with the five instructions of the defendant, which require the exercise of ordinary care as a condition to the right of recovery, and when it is read in connection with such instruction it could not have misled the jury. This view is sustained by the fol-

lowing decisions of this court: Willard v. Swansen, 126 Ill. 381, 18 N. E. 548; Chicago etc. R. R. Co. v. Warner, 123 Ill. 38, 14 N. E. 206; Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; Calumet Iron etc. Co. v. Martin, 115 Ill. 358, 3 N. E. 456; Chicago etc. R. R. Co. v. Johnson, 103 Ill. 512; Chicago etc. R. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381."

No instruction advised the jury that the plaintiff could recover if she was guilty of negligence herself. It is therefore not a case where the instructions are inconsistent with each other, so that the jury could not tell which instruction to follow, but it is a case where an element lacking in one instruction is supplied by another, and the exception is therefore not well taken.

Instructions numbered 6 and 7, asked by the defendants, were refused. Each would have advised the jury that if the plaintiff had knowledge of the dangerous and unsafe condition of the wall, and could at a moderate expense have prevented its fall, it was her duty to have incurred this expense. What we have already said in discussing instruction No. 13 given on the part of the plaintiff disposes of the errors assigned upon the refusal of these instructions 6 and 7.

The judgment of the appellate court will be affirmed.

The Subject of Party-walls is discussed at length in the monographic note to Duncomb v. Randolph, 89 Am. St. Rep. 924-945.

If the Owner of a Building Leaves the Walls standing in a dangerous condition after a fire, he is liable, after the expiration of a reasonable time, for failing to take measures to prevent the walls from falling: Ainsworth v. Lakin, 180 Mass. 397, 91 Am. St. Rep. 314, 62 N. E. 746, 57 L. R. A. 132; Lauer v. Palms, 129 Mich. 671, 89 N. W. 694, 58 L. R. A. 67; Sessengut v. Posey, 67 Ind. 408, 33 Am. Rep. 98; City of Anderson v. East, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726.

CASES
IN THE
SUPREME COURT
OF
IOWA.

**STATE v. CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.**

[122 Iowa, 22, 96 N. W. 904.]

RAILWAY, Liability of to Passenger for not Stopping at Crossings.—If an engineer is not liable to a passenger for not stopping at a crossing, as required by the code of Iowa, the corporation in whose employ he is cannot be held liable. (p. 256.)

STATUTES, PENAL, Construction of.—If a statute is penal in character, it ought not to be construed as fixing a liability where there is no fault. Hence, though a statute declares that all trains upon any railway which intersects or crosses any other railway on the same level shall be brought to a full stop at a distance of not less than two hundred and not more than eight hundred feet from the point of intersection, and that any engineer violating the provisions of the section shall be fined one hundred dollars, and the corporation on whose road the offense is committed two hundred dollars for each offense, neither can be held liable where the failure to stop was due to the brakes not working in the usual manner. (p. 256.)

PENAL ACTIONS—Burden of Proof.—In a penal action to recover a penalty for not stopping at a crossing, as required by the statute, the burden of proof is on the prosecution to show that the failure to so stop was due to the fault of the defendant. (p. 256.)

PENAL ACTIONS—Reasonable Doubt.—In a penal action the state must assume the burden of proof, but need not show that the offense has been committed beyond a reasonable doubt. Such cases are controlled by the rule of evidence governing civil actions. (pp. 256, 257.)

CONSTITUTIONAL LAW—Punishing Railway for Act of Engineer.—A statute imposing a penalty on a railway corporation for the failure of its engineer to stop at a crossing is not unconstitutional. It merely exacts of the corporation the duty of seeing that its employé acts in obedience to the statute. (p. 258.)

Action to recover of the defendant corporation a penalty for not stopping a train at a railway crossing as required by sec-

tion 2073 of the Code, a copy of which is set out in the opinion of the court. Verdict and judgment for the state, and the defendant appealed.

J. C. Cook, E. H. Addison and H. Loomis, for the appellant.

G. A. Underwood, for the state.

²³ LADD, J. The defendant admitted the failure of its train to stop within eight hundred feet and more than two hundred feet from the crossing, and interposed the defense that the engineer in charge did all he could to stop it, but that, owing to the brakes not working in the usual manner, the momentum of the train carried it over the crossing. The court submitted the case to the jury on the theory that the burden of proof was on the defendant, in order to exonerate itself from liability, to show by a preponderance of evidence that the failure to stop was not due to any negligence on the part of its employes in operating the train, or of the company in not having proper appliances, or in keeping those had in proper condition, and that the company might be liable even though the engineer was not. Possibly that should have been the law, but it was not so written by the legislature. The statute in question reads: "All trains run upon any railroad ²⁴ in this state which intersects or crosses any other railroad on the same level shall be brought to a full stop at a distance of not less than two hundred and not more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed, except as otherwise provided in this chapter. Any engineer violating the provisions of this section shall forfeit one hundred dollars for each offense, to be recovered in an action in the name of the state for the benefit of the school fund, and the corporation on whose road the offense is committed shall forfeit the sum of two hundred dollars for each offense to be recovered in like manner": Code, sec. 2073. The latter part of the statute is purely penal in character, with the evident object of punishing the offender, rather than afford a remedy for the wrongful act. In this respect it differs radically from provisions awarding damages flowing from certain acts, such as the setting out of fire. Its meaning, then, cannot be extended beyond the terms employed. But one offense is denounced by it, and that is the omission of the engineer to stop the train as required. The first sentence commands what shall be done—defines a duty; the first clause of the second sentence

imposes a penalty on any engineer for "each offense" of omitting such duty; the second clause of the second sentence adds a penalty against the corporation "on whose road such offense is committed." To what do these last words refer? Manifestly to the offense of which the engineer is guilty. No other is mentioned in the section. The statute cannot be fairly read otherwise. The thought seems to have been that, as the engineer controls the train, the fault in failing to stop as required is primarily his, and secondarily that of the company for which he acts. There is no ground for holding that the company may be liable independent of any fault of the engineer. The forfeiture of the corporation is made to depend upon his guilt of the offense defined, and upon that only.

²⁵ 2. As the statute is purely penal in character, it ought not to be construed as fixing an absolute liability. A failure to stop may sometimes occur, notwithstanding the utmost effort of the engineer. In such even this omission cannot be regarded as unlawful. The law never designs the infliction of punishment where there is no wrong. The necessity of intent of purpose is always to be implied in such statutes. An actual and conscious infraction of duty is contemplated. The maxim "*Actus non facit reum nisi meus sit rea*," obtains in all penal statutes unless excluded by their language. See *Regina v. Toole*, 23 Q. B. Div. 168, where it was said: "Crime is not committed where the mind of the person committing the act is innocent." See, also, *Sutherland on Statutory Construction*, sec. 354 et seq. No doubt many statutes impose a penalty regardless of the intention of those who violate them, but these ordinarily relate to matters which may be known definitely in advance. In such cases commission of the offense is due to neglect or inadvertence. But even then it can hardly be supposed the offender would be held if the act were committed when in a state of somnambulism or insanity. As it is to be assumed in the exercise of the proper care that the engineer has control of his train at all times, proof of the mere failure to stop makes out a *prima facie* case. But this was open to explanation, and if, from that given, it was made to appear that he made proper preparation, and intended to stop, and put forth every reasonable effort to do so, he should be exonerated. See *Furley v. Chicago etc. Ry. Co.*, 90 Iowa, 146, 57 N. W. 719, 23 L. R. A. 73.

This, however, did not shift the burden of proof. It was still on the state to show that the offense had been committed.

(see *Chaffee v. United States*, 18 Wall. 517, 21 L. ed. 908); not, however, by proof beyond a reasonable doubt, as contended by appellant. Suit for a penalty is by ordinary proceedings, and the general ²⁶ rules prevailing in civil actions should govern. Ordinarily, a party to succeed must establish the averments of his petition by a preponderance of evidence only. There are exceptions in equitable actions, in which clear and satisfactory evidence is required for the reformation of an instrument and the like, but we now recall no instance of an action to be prosecuted by ordinary proceeding in which more than a bare preponderance of the evidence is exacted: *McAnnulty v. Seick*, 59 Iowa, 586, 13 N. W. 743; *Coit v. Churchill*, 61 Iowa, 296, 16 N. W. 147; *Truman v. Bishop*, 83 Iowa, 697, 50 N. W. 278; *Callan v. Hanson*, 86 Iowa, 420, 53 N. W. 282; *Jamison v. Jamison*, 113 Iowa, 720, 84 N. W. 705. Even though a criminal act be the basis of recovery, the same rule obtains: *Welch v. Jugenheimer*, 56 Iowa, 11, 41 Am. Rep. 77, 8 N. W. 673; *Riley v. Norton*, 65 Iowa, 306, 21 N. W. 649. An action for a penalty or forfeiture should form no exception to the rule. A civil liability only is involved, and none of the reasons for exacting full proof, save the imputation of wrongdoing as in a criminal action, obtain: *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820; *Hitchcock v. Munger*, 15 N. H. 97; *State v. Kansas City etc. Ry. Co.*, 70 Mo. App. 634; *Hawloetz v. Kass* (C. C.), 25 Fed. 765; 16 Ency. of Pl. & Pr. 295. As said in the first of the above cases: "The purpose of the action is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused." *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908, is sometimes cited to the contrary, and seems to have been relied on in reaching the conclusion that the intensity of proof should be beyond a reasonable doubt in *Gulf etc. Ry. Co. v. Dwyer*, 84 Tex. 195, 19 S. W. 470; but, as pointed out in *Hawloetz v. Kass*, 25 Fed. 765, that question does not ²⁷ appear to have been considered. See, also, *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646. The weight of authority is with our conclusion that the right to recover may be established by a preponderance of the evidence.

Appellant questions the constitutionality of the statute in so far as it imposes a penalty upon the corporation for an offense of the engineer. As we understand the argument, it is that the legislature has no power to enact a statute punishing one person for an offense committed by another. Such is not the purport of this statute, however. The engineer is a mere employé or agent of the corporation. He is selected by it for this position of great responsibility in the operation of its property, and is under its directions. The statute exacts of the corporation the duty of seeing to it that such employé or agent do this in obedience to the statute, and on failure to do so inflicts a penalty, not alone for the omission of the engineer, but for its failure to compel the proper discharge of his duty. Other errors assigned will not be likely to arise on another trial.

Reversed.

Whether or not a Criminal Intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute in view of its manifest purpose and design: *Commonwealth v. Weiss*, 139 Pa. St. 247, 23 Am. St. Rep. 182, 21 Atl. 10, 11 L. R. A. 530. See, too, *People v. Curtis*, 129 Mich. 1, 87 N. W. 1040, 95 Am. St. Rep. 404, and cases cited in the cross-reference note thereto; *Russell v. State*, 66 Ark. 185, 74 Am. St. Rep. 78, 49 S. W. 821; *Haggerty v. St. Louis Ice etc. Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114, 40 L. R. A. 151. Ordinarily, the intent to violate a statute is present when a person commits an act prohibited by statute: *State v. Hildebrand*, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25.

In Actions to Recover a Penalty the defendant's guilt need be established only by a clear preponderance of the evidence, for the suit is in the nature of a civil proceeding: *Town of Havana v. Biggs*, 58 Ill. 483; *Roberge v. Burnham*, 124 Mass. 277; *Hitchcock v. Munger*, 15 N. H. 97; *People v. Briggs*, 47 Hun, 266, affirmed in 114 N. Y. 56, 20 N. E. 820; *Campbell v. Burns*, 94 Me. 127, 46 Atl. 812; *Louisville etc. R. R. Co. v. Hill*, 115 Ala. 334, 22 South. 163. Compare *Louisville etc. R. R. Co. v. Commonwealth*, 23 Ky. Law Rep. 1900, 66 S. W. 505.

BEEBE v. MAGOUN.

[122 Iowa, 94, 97 N. W. 986.]

CONSTITUTIONAL LAW — Taxation — Notice to Property Owner, When Required.—Whenever the amount of the taxes to be exacted depends on the judgment or discretion of those fixing the value of the property or the benefits by which such amount is to be measured, an opportunity must be given the property owner to be heard. Hence, if an assessment is authorized for the construction of drainage ditches to be equitably divided among the property owners along or in the vicinity of the improvement and those benefited thereby, and no provision is made for notice to the persons assessed and an opportunity to be heard against the assessment, the statute is unconstitutional as taking property, without due process of law. (p. 262.)

Suit to enjoin the collection of an assessment to raise funds to pay for a drainage ditch. The petition was dismissed, and the plaintiff appealed.

J. S. Lothrop, for the appellants.

Shaw, Sims & Kuehnle and P. A. Sawyer, for the appellees.

⁹⁴ LADD, J. By proceedings somewhat irregular, but in substantial conformity with sections 1939 to 1951, inclusive, of the Code, a ditch was located, "commencing at or near a clump of trees growing near the center of S. E. $\frac{1}{4}$ of section 15, Tp. 86, R. 45 west, in Woodbury county, and running thence in a southeast direction to the south line of Woodbury county, at or near the center of the south line of section 35 in said township and range." From there on it extended into Monona county. Appropriate orders were made by the board of supervisors, the contracts for the excavation let, and, as we understand, much of the work had been done before this suit was begun. "All the land benefited by the location and construction of the improvement" was divided into the classes "dry," "low,"⁹⁵ "wet," and "swamp"; and the appraisers reported that they had made "an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement . . . among the owners of the land along or in the vicinity of such improvement, and to be benefited thereby, in proportion to the benefit to each of them." Such proportional amount was duly levied by the board of supervisors against the respective tracts of land thought to have been benefited: Code, sec. 1946. The ditch did not run through

the land of the plaintiffs, nor did their lands abut thereon. Their lands were at considerable distance from the ditch, though probably not wholly without benefit from its construction. These owners never received notice of any of the proceedings, and were not apprised of the levy of the apportionate share of the necessary outlay until long after the time fixed for taking an appeal from the assessment to the district court, provided for by section 1947, had expired. Nor do the statutes require any notice, save "on the owner of each tract of land through or abutting upon which" the proposed improvement is to be made. The primary purpose of this notice is to enable them to make claim for damages which may be occasioned by the construction of the ditch. Whether it will also serve as notice that the cost, etc., will be apportioned, and in part levied against their lands, is not now for determination.

The extent of appellant's contention is that in so far as the statutes authorize the assessment and levy of taxes against lands through which the ditch does not run, and which do not abut upon it, they are in conflict with the provision of the state constitution prohibiting deprivation of property without due process of law. By "due process of law," in a case like this, is meant "notice and an opportunity of being heard," and the necessity therefor, as prerequisite to the taking of private property by taxation, is uniformly recognized. The subject received thoughtful ^{and} consideration in *Gatch v. City of Des Moines*, 63 Iowa, 718, 18 N. W. 310, and the conclusion was reached that "the arbitrary appropriation of private property without notice and without an opportunity for hearing cannot be defended upon any natural principle of justice, and ought not to be tolerated and upheld by the courts," and that "in the ordinary methods of assessment and valuation of property for taxation, whether for general or special purposes, the authorities are very nearly uniform to the effect that it is necessary to the validity of the assessment that the property owner should have notice and an opportunity to be heard." In that case statutes authorizing the assessment of the cost of street improvements against abutting lots without notice to the owners, and without affording an opportunity of being heard, were declared to be inimical to the provisions of the constitution. The question was again considered at length in *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, where statutes imposing an inheritance tax were declared subject to the same infirmity. Exceptions there may be as in the case of a poll tax,

a license tax, and the like, where the amount to be exacted is definitely fixed, and a hearing would be of no avail. The amount of the tax is not open to contest in such cases, though the liability for such amount may be, and can be, raised subsequently by disputing its collection, or in an action to recover it when obtained by duress. *McMillan v. Anderson*, 95 U. S. 37, 24 L. ed. 335, cited by appellee, was such a case. See, also, *Hodge v. Muscatine Co.*, 121 Iowa, 482, 96 N. W. 968. So where the amount is merely the result of a mathematical calculation the same rule obtains: *Amery v. City of Keokuk*, 72 Iowa, 701, 30 N. W. 780. But whenever the amount of tax to be exacted depends upon the exercise of the judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded: *Trustees of Griswold College v. City of Davenport*, 65 Iowa, 633, 22 N. W. 904. "It ⁹⁷ is not enough," as was said by the court of appeals in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, "that the owners chance to have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and the opportunity of being heard."

The presumption ordinarily prevails that a hearing would be advantageous, and whenever there is doubt the burden is upon the party upholding the tax to show the contrary: *Auer v. City of Dubuque*, 65 Iowa, 65, 22 N. W. 914. The facts of this case bring it clearly within the rule exacting an opportunity of being heard. In apportioning the outlay for the ditch, the appraisers must exercise judgment and discretion in dividing the lands drained into the four classes, according to benefits, and in determining to which class each tract belongs. If all land in each class is to bear the same relative burden, then the proportion to be borne by that in each of the different classes is to be determined in the same way. So, too, if the law be so construed that the benefits to each tract are to be separately estimated and assessed. The levy made by the board of supervisors then depends not only upon the estimation of benefits to be received by a particular tract, but upon the comparison of the relative benefits to the different tracts or classes of land drained. Indeed, it would be difficult to imagine a case in which the judgment and discretion in fixing values as the basis of the tax levy enter more largely. Such assessments are universally recognized as being peculiarly subject to infirmities, and

provision for their review and correction through notice and an opportunity for hearing at some time by some tribunal declared by the authorities generally as essential to their validity. Section 1947 of the Code points out the mode of hearing, but, as said, there is no provision whatever for the service of notice upon others than the owners of the land through ^{as} which the ditch runs, or abutting upon it. The contention of appellee that this court has ever declared notice not essential in such a case is without foundation. In *Yoemans v. Riddle*, 84 Iowa, 147, 50 N. W. 886, the ditch had been established under statutes prescribing notice, and the court held that reopening or repairing the same might be done, and the costs assessed, without other notice than the previous construction of the ditch and the law afforded. This, as we understand the opinion, was upon the theory that the reopening and repairing were contemplated in the original construction, and the authority exercised was then conferred upon the board. As summarized by the court: "It is very plain that the jurisdiction acquired by the original petition, notice, and other proceedings continues, and that the duty of exercising that jurisdiction is imposed upon the board of supervisors." In this view, the notice was continuing, and the owners of the land within the district created by the location of the ditch and the levy of taxes bound to avail themselves of the statutory remedies without other information, the same as in the case of the general taxation. Manifestly it was not intended to hold that notice may be entirely dispensed with in the levy of special assessments against property. In *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510, the proceedings were under the statute providing for the establishment of a drainage district, and the court held that notice and an opportunity to be heard upon the question whether his land was properly included within the district were all the land owner can justly demand. The statute, in so far as it authorizes the estimation of benefits to lands not abutting on a ditch, and through which it is not to be excavated, and the levy of taxes accordingly for such improvement without notice to the owner, is a clear and palpable invasion of the fundamental law forbidding the taking of private property without due process of law.

Reversed.

As to the Constitutionality of drainage and irrigation statutes, see Pioneer Irr. Dist. v. Bradley, 8 Idaho, 310, 68 Pac. 295, ante, p. 201,

and cases cited in the cross-reference note thereto. Proceedings for street improvements require notice and opportunity to be heard where the cost of the improvement is to be apportioned among those benefited; *Garvin v. Dausman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

MURRAY v. WILCOX.

[122 Iowa, 188, 97 N. W. 1087.]

PROCESS.—The Immunity from Service of Civil Process on a witness while attending the trial in another state to give evidence seems to be universally recognized. (p. 263.)

PROCESS.—Exemption of Party to Action from Service of While Attending Court.—A nonresident defendant in a criminal prosecution attending the courts of the state for the purpose of his trial is exempt from the service of civil process while coming and departing, as well as while actually in attendance at court. (p. 267.)

Action for breach of promise of marriage. After the service of process on the defendant, he moved to set aside such service on the ground that when it was made he was a nonresident and was in attendance on one of its courts on the trial of an indictment against him for a felony. The affidavit filed in support of the motion showed that the defendant came to the state from Nebraska on October 23, 1901, at which time he was put on trial under one indictment, and another pending against him was dismissed; that he intended to return to his home by the first train after these proceedings, but before he could do so process in this action was served on him. The motion was overruled, and at a subsequent term judgment by default was entered against him, from which he appealed.

No appearance for the appellee.

Tom H. Milner, for the appellant.

120 LADD, J. The immunity from service of civil process of a witness while attending a trial in a state other than that of his residence to give evidence seems to be universally recognized. The privilege protects him in coming, in staying, and in returning, if he acts in good faith, and without unreasonable delay: *Sherman v. Gundlauch*, 37 Minn. 118, 33 N. W. 549; *Mitchell v. Wixon*, 53 Mich. 541, 19 N. W. 176; *Thompson's Case*, 122 Mass. 428, 23 Am. St. Rep. 370; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35. See note to *Mullen v. Sanborn*,

79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721. As to whether a party is entitled to a like exemption there is some conflict in the authorities. In *Bishop v. Vose*, 27 Conn. 1, the defendant, a resident of another state, had come to Connecticut to attend the trial of a case which he had caused to be brought, and he was held not exempt from the service of summons; but in *Wilson Sewing Machine Co. v. Wilson* (C. C.), 22 Fed. 803, and ¹⁹⁰ *Wilson Sewing Machine Co. v. Wilson*, 51 Conn. 595, it was decided otherwise as to a nonresident defendant whose attendance was necessary both as a witness and to instruct his counsel, the reason for the distinction being that a plaintiff having sought the aid of the courts of another state ought not to shrink from being subjected to their control, while the attendance of the defendant may be said to be compulsory. In *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83, however, this distinction was disregarded, and the reason for exempting either a plaintiff or a defendant in a civil action, because of being a nonresident, from service of summons, was declared "fanciful, rather than substantial": See, also, *Ellis v. De Garmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 561. But a different view has been taken by the great weight of authority, declaring both party and witness alike entitled to the privilege: *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Shaver v. Letherby*, 73 Mich. 500, 41 N. W. 677; *Fisk v. Westover*, 4 S. Dak. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *In re Healy*, 53 Vt. 694, 38 Am. Rep. 713; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Matthews v. Tufts*, 87 N. Y. 568; *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48, 20 N. E. 250, 3 L. R. A. 266; *Halsey v. Stewart*, 4 N. J. L. 367.

As a party may testify in his own behalf in this state, there is no room for the distinction made between parties and witnesses, save possibly as suggested in the Connecticut cases. The reasons for exemption from service of process have been so often stated that repetition seems superfluous. They relate to the free and unhampered administration of justice in our courts, and are as applicable to service of summons or original notice as the beginning of an action by arrest on civil process under the old common-law practice. Said Elliott, J., in *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48, 20 N. E. 250, 3 L. R. A. 266, concerning the exemption: "It is his privilege, ¹⁹¹ under our laws, to testify in his own behalf; and this privilege should not be burdened with the hazard of defending

other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a nonresident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state, who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right, because he is willing to trust our courts and laws without removing his case to the federal courts, or refusing to put himself in a position where personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders." See, also, excerpts from numerous decisions collected in note to 25 L. R. A. 721. Of course, there may ¹⁹² be exceptions, as *Mullan v. Sanborn*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721, where a plaintiff in an attachment suit came from another state to testify, and was held not to be privileged from the service of summons while there in an action for maliciously bringing the attachment suit. Having resorted to this drastic remedy, the equal administration of justice seemed to demand recoupment of the resulting damages in the same jurisdiction.

It is also to be noted that the decisions with reference to immunity of witnesses of parties from service of process or summons within the same state, but in counties other than their residence, are in conflict: See *Christian v. Williams*, 111 Mo.

429, 20 S. W. 96. Though that question is not involved, it may be observed that it is probably settled by the statutes of this state. Unless, then, the privilege is obviated by some provision of our code, the defendant was entitled to the immunity claimed. Section 3541 provides that "the mode of appearance may be: . . . 1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery, and to be filed in the case; 2. By entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an appearance which shall be entered of record; 3. By an appearance even though especially made, by himself or attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition." The object had in enacting this statute was to do away with allowing a party to specially appear ¹⁹³ for the sole purpose of advising the court that he is not there: See *Hodges v. Brett*, 4 G. Greene (Iowa), 345. It relates to the acquirement of jurisdiction of the person, and not what shall be done with him after jurisdiction has been obtained. No exception was taken by the defendant to the manner of service or to the character of the notice, and he admits having been brought into court. What he objected to was being detained therein and compelled to plead to plaintiff's petition and litigate the issues in a jurisdiction into which the plaintiff had no right to bring him. The service is merely the method of invoking jurisdiction. The immunity extends further, and shields him from litigating the controversy in the place where he was exempt from service. If he had failed to appear, this would have been a waiver of his privilege, and a valid and binding judgment might have been rendered against him: *Thornton v. American Writing Machine Co.*, 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 679; *Freeman on Judgments*, sec. 296; note to 25 L. R. A. 721. In enacting the above statute, and in authorizing suit against a nonresident in any county of the state where found, the legislature had no thought of interfering with a rule concerning exemption from service of notice: *Wilson v. Donaldson*, 117 Ind. 356, 10

Am. St. Rep. 48, 20 N. E. 250, 3 L. R. A. 266; Fisk v. Westover, 4 S. Dak. 39, 46 Am. St. Rep. 780, 55 N. W. 961. These statutes, like others, were enacted with reference to the great body of law as it existed, and should not be isolated therefrom when being construed.

The suit contemplated is such as may be properly instituted, and against which the defendant is not shielded by the privileges of his situation. The circumstances were such as to bring the case clearly within the rule announced. The defendant was bound to be in attendance of court to avoid the forfeiture of his bond. He came also as a witness in his own behalf. His stay was not unreasonable, ¹⁹⁴ and he should have been allowed to go hence from the jurisdiction of the court, which had been illegally invoked against him. The remedy by motion of which defendant availed himself was that generally recognized by the authorities as appropriate. Indeed, it would seem that no other would have been effective in relieving him from in some way responding to the petition and in dismissing him from the court's jurisdiction.

Reversed.

A Nonresident Sutor, whether plaintiff or defendant, coming into a state for the sole purpose of attending the trial of his case, such attendance being shown to be necessary, is, according to the better rule, privileged from the service of civil process. Some authorities, however, take a contrary view: See the monographic note to Worth v. Norton, 76 Am. St. Rep. 536-538; Guynn v. McDanel, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74; State v. Kennan, 33 Wash. 247, 99 Am. St. Rep. 949, 74 Pac. 881; Greenleaf v. People's Bank, 133 N. C. 292, 98 Am. St. Rep. 709, 45 S. E. 638.

COWAN v. WESTERN UNION TELEGRAPH COMPANY.

[122 Iowa, 379, 98 N. W. 281.]

TELEGRAPH CORPORATIONS.—Damages are Recoverable for Mental Anguish and Suffering resulting from the failure of a telegraph corporation to properly transmit a message. (p. 270.)

DAMAGES—Mental Suffering.—In an Action Sounding in Tort the rule allowing recovery for mental suffering is much more liberal than in actions on contract. (p. 272.)

DAMAGES, When not Limited to the Damages Arising from the Breach of a Contract.—Though the failure of a telegraph corporation to correctly transmit a message is a breach of a contract, the damages to which it is liable are not limited to the plaintiff's damages for such breach. The negligence in the performance of the obligation by which injury resulted to him is a tort, damages for which are not restricted by the rules applicable to ordinary actions for breach of contract. (p. 273.)

ACTIONS, When may be Treated as Ex Delicto Though Based on Contracts.—An allegation by the plaintiff of contractual relations with him in an action against a telegraph corporation for the failure to correctly transmit a message does not necessarily make the action one upon contract. These matters may properly be pleaded by way of inducement preliminary to the allegation of facts constituting a tort, and the action may, therefore, be treated as ex delicto rather than ex contractu. (p. 273.)

DAMAGES, Consequential in Actions of Tort.—One who commits a trespass or other wrongful act is liable for all the direct injuries resulting from such act, although such injury could not have been contemplated as a probable result of the act done. Hence, in this class of actions, recovery may be had for mental suffering. (p. 274.)

DAMAGES—Mental Suffering.—The impossibility of providing any exact standard or measure of compensation for injured feelings does not constitute a sufficient reason for refusing to award damages for mental anguish resulting from the incorrect transmission of a telegram. (p. 275.)

PLEADING, Contributory Negligence, Failure to Negative.—A complaint against a telegraph corporation to recover damages for its negligently failing to transmit a message correctly, need not allege the absence of contributory negligence on the part of the plaintiff, where the statute provides that such a corporation is liable for all mistakes or delays in transmitting or receiving messages over its lines, and that in actions to recover damages thus caused, the burden is on the corporation to prove that the mistake or delay was not due to its negligence. (p. 275.)

Action to recover damages for the incorrect transmission of a telegram claimed to be due to the negligence of the defendant corporation. Verdict and judgment for the plaintiff, and the defendant appealed.

George H. Fearons, Carr, Hewitt, Parker & Wright and Carakadden & Burk, for the appellant.

Courts & Tomlinson and W. E. Blake, for the appellee.

³³⁰ WEAVER, J. The evidence tends to establish the following state of facts: James Henry Cowan died in Louisa county, Iowa, on or about January 12, 1901. Immediately upon his death, his widow, the plaintiff herein, prepared to take his body to the home of his parents and other family relatives, near Seaton, Illinois, for burial. To apprise these friends of the decease of her husband, and to insure their meeting her at the station upon her arrival with the body and accompanying her to the family home, some miles in the country, she sent a message by the defendant to one Robert Swearingen, who was an acquaintance of the family, and the manager of a telephone exchange at Seaton, as follows: "Harry dead. Arrive with corpee at 6 A. M. Tell Thomas. [Signed] Edith Cowan." The message was received by Swearingen in the evening, in time to have notified the parties; and he would have given the notice, and plaintiff would have been met at the station and cared for as expected by her but for the mistake or negligence of the telegraph company. As delivered by the telegraph company, the message was signed, "Edith Erwin," and Swearingen, not knowing and being unable to learn of any person of that name, and not knowing for whom the message was in fact intended, did nothing with it. The relatives of the deceased, having received no notice of his death or of the coming of the widow, did not meet her at the station. Arriving there, and finding none of the friends in waiting, and no preparation made for the conveyance of herself and the body of her husband to their destination in the country, plaintiff was much distressed in mind, and, to some extent, broken down in bodily strength. She was thereupon taken to a hotel by a brother, who accompanied her, and placed upon a couch, where she remained three or four hours, until her friends had been notified, and arrived with conveyance for her accommodation. These allegations are not in serious dispute, and upon them plaintiff seeks to recover damages. The jury returned a verdict in her favor for two hundred and seventy-five dollars, and from the judgment entered thereon defendant appeals.

³³¹ It will be observed that the basis of plaintiff's claim for damages is mental anguish and suffering resulting to her from the failure of defendant to properly transmit the message to

Swearinger. That such damages are recoverable in a proper case was held by this court in *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, 28 L. R. A. 72, and, unless we abandon that precedent, plaintiff's right of action must be conceded. Anticipating this suggestion, counsel for appellant submit an able and elaborate argument in support of their contention that the *Mentzer* case should be overruled. The decision of that case was reached only after much deliberation and a careful review of the authorities. Most of the cases now so exhaustively marshaled were then called to our attention, and their bearing and value duly considered. We are still satisfied with the result there announced, and recognize its authority as a precedent in the case before us. The opinion accompanying that decision sets forth very fully the principles upon which it is founded, and there is no occasion for their restatement at this time.

We are reminded by counsel that *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, cited by us in support of our decision in the *Mentzer* case, has since been overruled by the Indiana court. This appears to be the case, but we must be permitted to say that, being satisfied with the strength of the reasoning and soundness of the principles announced in the first case, we are not disposed to concur in their recantation. Uniformity in judicial holdings throughout the various jurisdictions of the nation is much to be desired, and, where it prevails, no court should lightly disregard it, or introduce confusion into the precedents. But where, as upon the questions raised by this appeal, there is an irreconcilable conflict in the decisions, and respectable courts are arrayed upon either side of the controversy, we feel at liberty to adopt the theory which seems to us most logical, reasonable and just, without special reference to the numerical preponderance of the authorities. As suggested in the *Mentzer* case: "One of the crowning glories of the ³⁸² common law has been its elasticity and adaptability to new conditions and new states of fact. . . . Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into." It is nevertheless true that every demonstration of this elastic quality of the common law, and every readjustment made necessary by changing conditions, has been accomplished over the insistent protest and opposition of those who have professed to find in it a subtle and dangerous attack upon fundamental principles. The recog-

nition of the right of a party under certain circumstances to recover substantial damages for physical and mental suffering has been no exception to this rule, and even yet it is the subject of much controversy. Recovery of such damages was at first sought to be confined to cases of mental suffering arising from physical injury wrongfully or negligently inflicted. So strictly and literally has this rule been applied, that in some jurisdictions it has been held that a wrongful act producing nervous shock or fright, which results in physical prostration, insanity, and death, affords no cause of action against the wrongdoer: *Mitchell v. Rochester etc. R. R. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354, 34 L. R. A. 781; *Haile v. Texas etc. Ry. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, 23 Atl. 340, 14 L. R. A. 666. The doctrine thus approved is so manifestly unjust, and so out of harmony with the general spirit of the law, that many courts have wholly repudiated it, while still others have limited and modified it by important exceptions. In direct opposition to the cases above cited as to damages arising from fright or nervous shock in the absence of immediate physical injury, we may note *Gulf etc. Ry. Co. v. Hayter*, 93 Tex. 239, 77 Am. St. Rep. 856, 54 S. W. 944, 47 L. R. A. 325; *Purcell v. St. Paul etc. Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Oliver v. La Valle*, 38 Wis. 596; *Stutz v. Chicago etc. Ry. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653; *Watkins v. Kaolin Co.*, 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617; *Watson v. Dilts*, 116 Iowa, 249, 93 Am. St. Rep. 239, 89 N. W. 1068, 57 L. R. A. 559.

Recovery has also been permitted for the mental suffering of a husband on account of the illness of his wife, occasioned by the negligent act of a railroad company in causing them to alight from the train at an unreasonable distance from the proper station (*Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911); also for mental suffering occasioned by the malicious prosecution of a civil action (*Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800); for mental and bodily suffering sustained by a sick person while awaiting the arrival of a physician, whose coming had been delayed by failure of a telegraph company to deliver a message sent him (*Western Union Tel. Co. v. Church*, 3 Neb. (Unofficial) 22, 90 N. W. 878, 57 L. R. A. 905); for nervous shock and mental distress of a woman who was wrongfully required to leave the train upon

which she was a passenger, though no physical force or violence was used in excluding her (*Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193); for humiliation by wrongful arrest in the presence of family and friends (*Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 47; *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921); and for injury to feelings of one whose property has been wrongfully attached (*City Bank v. Jeffries*, 73 Ala. 183). Under a California statute, permitting the father to maintain an action for the death of a minor child, and providing that such damages may be given as, under all the circumstances, may be just, it is held that the parent's mental anguish may be considered by the jury in finding its verdict. Practically parallel in point of fact with this case is *Western Union Tel. Co. v. Giffen*, 27 Tex. Civ. App. 306, 65 S. W. 661, and a recovery of substantial damages is there sustained. For further reaffirmation of the same principle, see *Bennett v. Western Union Tel. Co.*, 128 N. C. 103, 38 S. E. 249; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 22 Ky. Law Rep. 53, 54 S. W. 827; *Western Union Tel. Co. v. Fisher*, 107 Ky. 413, 21 Ky. Law Rep. 1293, 54 S. W. 830; *Western Union Tel. Co. v. Crocker*, 135 Ala. 497, 33 South. 45, 59 L. R. A. 398. Some of the foregoing cases go much further than is necessary for us to go in disposing of this appeal, and we cite them not as adopting all their conclusions, but as indicating that the rule asserted by the appellant is not to be considered as of universal application.

In the case now sought to be overruled we call attention to the proposition (often overlooked in discussing this much-vexed question) that in an action sounding in tort, the rule allowing recovery for mental suffering is much more liberal than in actions on contract. Many of the decisions which deny the soundness of the rule adopted in the *Mentzer* case expressly plant their finding upon the principle that mental suffering cannot be presumed to have been within the contemplation of the parties to the contract as a necessary or natural result of its breach. For instance, the supreme court of Minnesota, in an action for damages on account of nondelivery of a telegram, says: "This action is not one of tort, but on contract. . . . We are therefore left to determine the question here presented according to the rules of common law applicable to damages for breach of contract": *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078, 25 L. R. A. 406. If this premise be admitted, it must also be conceded that the con-

clusion announced by that eminent court is supported by many precedents. We cannot agree, however, that, in a case of this kind, plaintiff is limited to his damages as for a breach of contract. True, appellant's undertaking to transmit the message was a contract obligation; but negligence in the performance of that obligation, by which injury results to the sender, is a tort, damages for which are not restricted by rules applicable to ordinary actions for breach of contract. The appellant company is engaged in a public employment, and is, within certain limits, to be considered and treated as a common carrier: *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 17 Atl. 736, 4 L. R. A. 611; *Parks v. Alta California Tel. Co.*, 13 Cal. 385 422, 73 Am. Dec. 589. As such, it is charged with a common-law duty, and "an action may be brought in tort, although the breach of duty is the doing or not doing of something contrary to an agreement made in the course of such employment": *Southern Express Co. v. McVeigh*, 20 Gratt. 264. "A breach of duty of a common carrier is a breach of the law, for which an action lies, and which wants not a contract to support it": *Bretherton v. Wood*, 3 B. & B. 54, 6 Moore, 141, 9 Price, 408; *Burkle v. Ells*, 4 How. Pr. 288; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 362, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214. This principle is discussed with great clearness and thoroughness in *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, where it is said in reference to the facts pleaded as constituting actionable negligence: "All these matters are a breach of contract to carry the passenger safely, yet the carrier is held liable in an action for tort. . . . All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon contract, alleging the negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the negligence of the company the ground of his right of recovery."

The allegations by the plaintiff of contractual relations with the defendant does not necessarily make the action one upon contract, for these matters are often properly pleaded by way of inducement preliminary to an allegation of facts constituting a tort. Nor is this rule peculiar to actions against carriers: *Britt v. Pitts*, 111 Ala. 401, 20 South. 484; *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Carter v. Glass*, 44 Mich. 154, 38 Am. Rep. 240, 6 N. W. 200; *Stanley v. Bircher*, 78 Mo. 245; *Ashmore v. Pennsylvania Steam Towing Co.*, 28 N. J. L. 180; *Dungan v. Read*,

167 Pa. St. 393, 31 Atl. 639; *Harvey v. Skipwith*, 16 Gratt. 393; *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, 40 N. W. 228, 1 L. R. A. 719.

If, then, we may treat this action as one *ex delicto*, rather than *ex contractu*, it becomes important to note the enlarged ³⁸⁶ scope of the claim for recoverable damages. In an action upon contract it is usually laid down that no damages can be recovered save those which may reasonably be supposed to have been contemplated by the parties as the probable result of a breach of the agreement, and this is the principle almost invariably appealed to or relied upon by the courts which deny the liability of telegraph companies for damages on account of mental suffering. Recovery in tort is not thus limited. The rule applicable to such cases is that "a party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done": *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Keenan v. Cananaugh*, 44 Vt. 268; *Metallic etc. Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Hill v. Winsor*, 118 Mass. 251; 1 *Sedgwick on Damages*, 130, note; *Bowas v. Pioneer T. L.*, 2 Saw. 21, Fed. Cas. No. 1713. Under this rule it has often been held that damages for mental suffering may be recovered, and such allowance has not been strictly confined to wrongs involving bodily injury. The Minnesota court, which, as we note in the *Francis* case, denies the right of such recovery against a telegraph company on the theory that the action is *ex contractu*, has not hesitated to allow damages of this nature in certain actions in tort: *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238, 14 L. R. A. 85. In the cited case, plaintiff alleged the wrongful dissection by the defendant of the dead body of her husband, and asked for damages on account of mental suffering alone. The court after noting the confusion which has arisen in the cases "as to when, if ever, mental suffering, as a distinct element of damages, is a subject for compensation," says: "But where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of a wrongful act. . . . That mental suffering would ordinarily be the natural and proximate result of knowledge that ³⁸⁷ the remains of the deceased husband had been mutilated is too plain to admit of argument." The decisions which recognize the right to recover

damages for mental pain and anxiety caused by negligence of a telegraph company in transmitting messages involving matters of life and death need no better justification than is found in the principles here so clearly stated.

The thought urged upon our attention, that claims of this nature should be disallowed because of the impossibility of providing any exact standard or measure of compensation of injured feelings, and that recognition of such right of recovery will be followed by an enormous increase of litigation, does not impress us as a persuasive consideration. It is no more difficult to fix a compensation for mental anguish in cases like the one at bar than in cases of mental suffering arising from physical injury, and very few persons, we think, will be found ready to say the latter, when wrongfully occasioned, should not afford a ground of recovery. As to the prospect of vastly increased litigation, the fears expressed by the appellant find little foundation in the judicial history of the state. The Mentzer case was decided ten years ago, and the present is the first occasion we have had in that decade to again consider the precise question there presented. This showing is a pretty fair indication that the doctrine there affirmed has not proved, and is not likely to prove, the opening of a Pandora's box of evil for the vexation or destruction of legitimate business.

2. It is finally insisted that plaintiff's petition does not state a cause of action, because, while it alleges the negligence of defendant, it does not allege the absence of contributory negligence on her own part. We think the rule contended for is not applicable in this case. Our statute provides (Code, section 2164) that a telegraph company is liable for all mistakes or delays in transmitting or receiving messages over its lines, and that, in actions brought to recover damages thus caused, the burden is upon the company to prove that the mistake or delay is not due to its own negligence. ³⁸⁸ This, we think, relieves the plaintiff from the necessity of alleging that she did not contribute to her own injury.

We find no error in the record, and the judgment of the district court is affirmed.

Mental Anguish as an element of damages is considered in the monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534-537. And damages for mental pain resulting from negligence in sending a telegram is considered in the monographic notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790; *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875. On this question the au-

thorities are conflicting: See the recent cases of *Western Union Tel. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751; *Gray v. Telegraph Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 64 S. W. 1063, 56 L. R. A. 301; *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919, and cases cited in the cross-reference note thereto. Damages for fright are discussed in the monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 862-865; *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 97 Am. St. Rep. 509, 92 N. W. 542, 60 L. R. A. 403.

COOLEY v. BARKER.

[122 Iowa, 440, 98 N. W. 289.]

JUDGMENTS of Justices of the Peace—Jurisdiction Based on Forgery.—When a contract as sued upon contains a stipulation making it payable at a specified place, which stipulation, if genuine, would give the justice of the peace at that place jurisdiction, and it is there sued upon and judgment rendered by default, such judgment is void if such stipulation was in fact a forgery, being added to the contract after its execution without the authority of the maker. (p. 278.)

JUDGMENT, Relief from in Equity—Laches.—A party cannot be denied relief from a void judgment, because of laches, where there has been no attempt to enforce it, because, until then, the complainant had no occasion to act. (p. 278.)

JUDGMENT, Relief Against, Though It is Shown that the Defendant was not Indebted.—In a suit to enjoin the enforcement of a judgment on the ground that it is void, the complainant is not required to show that he is not indebted on the cause of action which was the basis of the suit. (p. 278.)

Suit to enjoin the levy of an execution and the enforcement of a judgment of a justice of the peace of Pottawattamie county rendered against a nonresident of that county. Plaintiff's petition was dismissed and he appealed.

John Lindt and Temple, Hardinger & Temple, for the appellant.

J. B. Sweet and Stone & Tingley, for the appellees.

440 DEEMER, C. J. Plaintiff is a resident of Clarke county, Iowa. In the year 1898 he gave an order for lightning-rods **441** to an agent of Cole Brothers, a copartnership doing business at Council Bluffs, in Pottawattamie county. The rods were erected, and plaintiff refusing to pay therefor, an assignee of the contract brought action for the contract price before a

justice of the peace in and for Pottawattamie county, and exhibited an instrument which, on its face, made the contract price payable at Council Bluffs, Iowa. A notice of the action, reciting that the contract was by its terms to be performed at Council Bluffs, was served upon plaintiff in Clarke county, Iowa; and, as he failed to appear before the justice of the peace on return day, a judgment was rendered against him for the contract price, which was afterward transcribed to the district court of Pottawattamie county. Thereupon an execution issued, which was about to be levied upon plaintiff's property in Clarke county, whereupon this action was commenced in Pottawattamie county against the plaintiff in the judgment and the officer having the execution, to enjoin the levy thereof and to restrain the enforcement of the judgment.

Claim is made that the justice who rendered the judgment was without jurisdiction, for the reason that while the contract, as presented to him, was made payable at Council Bluffs, yet this provision was not in the contract when he signed it, and that it is in fact a forgery. This is denied, and this denial raises an issue of fact, which must first be determined before we reach the legal propositions involved. An examination of the record leads us to the conclusion that plaintiff's contention as to the facts is true, and that the instrument, when signed by him, did not contain this provision for payment at Council Bluffs. It was this provision which, under our statute, gave the justice jurisdiction of the case. Without it, he had no jurisdiction of a resident of another county. Even if the defendant had appeared, this would not, under our decisions, have given the justice jurisdiction. But as he did not appear, but made default, that question is out of the case. A court which in fact has no jurisdiction cannot, by deciding that it has, confer upon itself the right ⁴⁴³ to adjudicate a controversy. This is fundamental doctrine, although there are exceptions in some cases which come dangerously near overthrowing the rule. With these exceptions we have nothing to do in this case, save to say that they do not apply.

Appellees contend that the justice was required to determine this matter before rendering judgment, and that his finding is conclusive. This contention has support in a few jurisdictions, notably in New York, but to our minds is unsound in theory and vicious in its application. If the court in fact has no jurisdiction, its judgment is subject to attack whenever and wherever the question arises, and it is permissible in such cases

to show by parol evidence that the facts which apparently gave jurisdiction were untrue. If this were not true, one might be concluded by a court having no right to take cognizance of the subject matter. In *Porter v. Welch*, 117 Iowa, 144, 90 N. W. 582, we held that a justice has no jurisdiction over a resident of another county, even upon appearance by that party, and that the objection of want of power or right in such cases goes to the subject matter, rather than to the parties. But we need not go that far here. The provision for performance at Council Bluffs was the only thing that gave the justice jurisdiction, and, if there was no such provision when plaintiff herein signed the contract, then the justice had no right to consider the case. Plaintiff, knowing that fact, might very well have given no attention to the notice which was served upon him, for he knew that, whatever the justice might do, the conclusion would not be binding upon him: *Hamilton v. Millhouse*, 46 Iowa, 74. Of course, if the justice had jurisdiction and the right to decide, and plaintiff herein was relying simply on his defense of alteration of the instrument to defeat recovery, a different question would be presented. In such a case he should have made his defense before the justice, and, in the event of failure to do so, would be concluded by the judgment. This clearly illustrates the distinction between a right decision and the right to decide. In one case the judgment is conclusive, and in ⁴⁴³ the other it is not. This feature of the case is ruled by *Gregory v. Howell*, 118 Iowa, 26, 91 N. W. 779.

Appellees also contend that plaintiff is not entitled to relief because of laches, and for the further reason that he does not show that he was not in fact indebted to the plaintiff in the judgment. There is no foundation either in fact or law for the first proposition. Plaintiff had no occasion to act until some attempt was made to enforce the void judgment. When that was done, he brought his action. It was timely, and defendants were in no manner prejudiced by the delay. As to the second point the cases heretofore decided by this court are against appellees' claim. If the judgment is absolutely void, as this one was, the plaintiff was not required to show that he was not indebted on the cause of action which was the basis of the suit: *Arnold v. Hawley*, 67 Iowa, 313, 25 N. W. 259; *Henkle v. Holmes*, 97 Iowa, 695, 66 N. W. 910; *Spencer v. Berns*, 114 Iowa, 26, 98 N. W. 209, and cases cited.

We do not set out the evidence on which we rely for our conclusion on the issue of fact. Suffice it to say that it strongly

preponderates in favor of the plaintiff's contention, and is sufficient, we think, to justify the relief asked.

The case will be reversed and remanded to the lower court for a decree in harmony with this opinion.

If a Judgment is void for want of jurisdiction over the parties, it generally may be vacated on motion, no matter what length of time has elapsed since its entry: See the monographic note to Furman v. Furman, 60 Am. St. Rep. 642, 660. Consult, also Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737, ante, p. 221, and authorities cited in the cross-reference note thereto. The question of extrinsic evidence for and against jurisdictional infirmities in such cases is considered at pages 644-647 of the above note.

ENGBRETSON v. SEIBERLING.

[122 Iowa, 522, 98 N. W. 319.]

ACCORD AND SATISFACTION, Payment in Part, When Amounts to.—The acceptance from an insolvent debtor of part payment in full satisfaction of a claim is founded on such a consideration that the entire debt is discharged. (p. 282.)

Suit to enjoin the enforcement of an execution on the ground that the judgment had been satisfied. Judgment for the defendants, and the plaintiff appealed.

E. P. Johnson, for the appellant.

E. W. Cutting, for the appellees.

⁵²² **McCLAIN, J.** It appears from the allegations of plaintiff's petition, which are in accordance with the evidence introduced on the trial, that J. F. Seiberling & Co., being the owners of a judgment recovered by them against this plaintiff for two hundred and fifty-six dollars, accepted from such judgment debtor the sum of sixty-five dollars in cash and his promissory note for twenty-five dollars, in full satisfaction of said judgment. J. F. Seiberling & Co. subsequently assigned the judgment to W. H. Carter, who caused execution to issue thereon. It is further averred and proved that at the time the agreement was made to accept the partial payment in full satisfaction Engbretson was insolvent. The sole question for our consideration is whether the acceptance ⁵²³ from an insolvent debtor of part payment in full satisfaction of a claim is founded upon such consideration that the entire debt is thereby dis-

charged. The general rule that an agreement to accept part payment in full satisfaction is invalid for want of consideration, and the usual exceptions to that rule, have been often considered by this court, and a general citation of authorities on the subject is unnecessary: See *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105; *Stroutenberg v. Huisman*, 93 Iowa, 213, 61 N. W. 917; *Ruddleedin v. Smith*, 36 Iowa, 669. But in none of these cases, nor in any others decided in this state, do we find an express exception, such as that insisted upon by the plaintiff in this case. We do, however, find suggestions in each of those cases indicating the existence of the thought that perhaps such an exception should be made in a proper case. In *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862, it is said: "If, however, such an agreement is supported by any new consideration, though insignificant or technical merely, if valuable, it will be upheld. Thus, if a part is to be and is paid before due, or at a place other than that at which the obligor was legally required to pay, or a payment is made in property, no matter what its value, or by the debtor in composition with his creditors generally, in which they agree to accept less than their demands, the consideration is held to be sufficient." And it was decided in that case that if the debtor, having no other way of obtaining the money which he was to pay in satisfaction of the debt, induced another to pay it for him, the acceptance of a less sum than the full amount of the debt thus procured to be paid by another would support an agreement to discharge the entire debt. In *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105, the court adverted to the fact that the defendant, relying on part payment in satisfaction of the entire indebtedness, might, in one sense at least, be said to have been an insolvent debtor, and the court in that case says that an agreement to accept part payment in full satisfaction of a judgment, if fully executed, is valid as a discharge of the entire judgment. And in *Stroutenberg v. Huisman*, 93 Iowa, 213, 61 N. W. 917, it is said, as a reason for sustaining the full release ⁵²⁴ of a judgment on part payment, that "the settlement avoided litigation, settled the dispute, canceled the judgment, and secured the payment of seventy-five dollars from the insolvent debtor." In *Ruddleedin v. Smith*, 36 Iowa, 669, this language is used: "It is true that the amount realized by the judgment plaintiffs was less than half the amount of their judgment, but the defendant therein was in-

solvent, and the real property they had purchased under their execution sale was subject to a prior encumbrance."

It cannot be claimed that these cases are by any means conclusive upon us in the determination of the question now for the first time squarely and clearly presented, but they certainly indicate a predisposition to regard the insolvency of the debtor as a matter which might be considered in determining the validity of an agreement to accept part payment in full discharge. There is some support for such a proposition in the decisions of other courts. In *Curtiss v. Martin*, 20 Ill. 557, the court, after stating the general rule, says (at page 577): "But if a smaller sum be taken by way of a compromise of a controverted claim, or from a debtor in failing circumstances, in full discharge of the debt, no reason is perceived why it should not be binding on the parties." In *Dawson v. Beall*, 68 Ga. 328, it is held that an agreement by a debtor not to go into bankruptcy, and thereby be discharged from the payment of the debt, furnishes a sufficient consideration to support a contract by the debtor to take less than the full amount thereof, and substantially the same conclusion is reached in *Hinckley v. Arey*, 27 Me. 362. So, in *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290, it was held that part payment by an assignee for the benefit of creditors, accepted in full satisfaction, was binding. In *Rice v. London etc. Mtg. Co.*, 70 Minn. 77, 72 N. W. 826, it was held that acceptance from the administrator of an estate of part payment in full satisfaction of a claim against the estate was binding, although it subsequently appeared that the estate was not insolvent. The only case which we have been able to find to the contrary is that ⁵²⁵ of *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159, in which the court squarely holds that the fact of the debtor's insolvency can have no influence in determining whether the agreement of the creditor to accept a less sum than the entire debt in full satisfaction is without consideration; for it is said, whether the debtor is insolvent or not, the obligation to pay is not impaired, and the moral duty to make payment remains in full force. In view of the fact that, as indicated by the prior decisions on the question in this state, the rule that an agreement to accept part payment in full satisfaction is without consideration is purely technical, and subject to many exceptions which the courts have ingrafted upon it from time to time in order to avoid to some extent the injustice which is recognized as frequently resulting from its strict application, we are led to adopt as valid and reasonable the

exception which has been hinted at or suggested, rather than authoritatively announced, in the cases already cited. Our conclusion is, therefore, that plaintiff in this case had a good defense to the enforcement of the judgment against him, and that his action to enjoin the further enforcement of the judgment should not have been dismissed as being without equity.

Reversed.

The Principal Case is cited and considered with other similar decisions in the monographic note to *Harrison v. Henderson*, 100 Am. St. Rep. 390-456.

BAXTER v. PRITCHARD.

[122 Iowa, 590, 98 N. W. 372.]

DEEDS, Parol Surrender of a Right to Redeem from a Deed Absolute on Its Face.—When a deed absolute on its face is given with a parol agreement that it is given and received as security for a debt, the grantor may, by parol agreement, surrender his right of redemption, and vest complete title in the grantee. (p. 283.)

Suit by a judgment creditor of John R. Pritchard to have a conveyance made by him to William C. Pritchard declared a mortgage, and that plaintiff be permitted to redeem as a judgment creditor of the grantor. Judgment for the defendants, from which the plaintiff appealed.

Charles S. Macomber and William C. Miller, for the appellant.

Frank H. Gains, J. C. Walters, and Gains, Kelby & Storey, for the appellees.

⁵⁹⁰ SHERWIN, J. At the time this conveyance was made the land was encumbered for all or more than its market value. There were two mortgages on the land, and a judgment against John R. Pritchard which was a lien thereon. The ⁵⁹¹ deed to William C. Pritchard was in fact given as security against possible future liability on account of the grantor, but in terms it was an absolute deed, and vested in the grantee the legal title to the land: *Richards v. Crawford*, 50 Iowa, 496. No other writing was executed by them, and the vendor's right of redemption, therefore, rested in parol. The evidence is quite conclusive that afterward, and before the plaintiff obtained his judgment against John R. Pritchard, the latter surrendered to

William C. Pritchard his right of redemption and the possession of the land under an agreement whereby the latter assumed the prior encumbrance upon the land and relieved the former from personal liability thereon. This surrender was in parol, it is true, but it has repeatedly been held in this state—and, indeed, it is the general rule—that it may be so made, and that, when so made, the title of the grantee becomes absolute: *Haggerty v. Brower*, 105 Iowa, 395, 75 N. W. 321; *Caruthers v. Hunt*, 18 Iowa, 576; *Vennum v. Babcock*, 13 Iowa, 194. There is nothing in the claim that the title was held by William C. Pritchard in trust for other creditors. No such issue was made, and there is no evidence tending to prove it. We also think the plea of former adjudication good, but we need not discuss it, inasmuch as we shall affirm the case on its merits.

The judgment is affirmed.

Where an Absolute Deed is given as security for an indebtedness, a bona fide agreement may be made between the mortgagor and mortgagee for the extinguishment of the equity of redemption, and the vesting of the entire title in the latter, but such an agreement will never be sustained unless the transaction is fair and unaccompanied by oppression, fraud or undue influence: Cassem v. Heutis, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283. See, however, the monographic note to Bradbury v. Davenport, 55 Am. St. Rep. 102, 103, on contracts to waive or release the equity of redemption.

SAYLOR v. PARSONS.

[122 Iowa, 679, 98 N. W. 500.]

NEGLIGENCE, Contributory in Attempting a Rescue.—One who seeks to rescue another from imminent danger, thereby imperiling his own life, is not necessarily guilty of contributory negligence. He who springs to the rescue of another, encountering great danger to himself, is not to be denounced as negligent, but the propriety of his conduct is to be left to the judgment of the jury. (p. 284.)

NEGLIGENCE, Recovery for Injuries Suffered in Attempting a Rescue.—An employé who, in attempting to rescue one of his employers from immediate danger, is himself injured, cannot recover from his employers or the one rescued, unless it appears that he or they were guilty of some negligence toward such rescuer. (p. 287.)

NEGLIGENCE in Placing One's Self in Peril Resulting in Injury to the Rescuer.—One who places himself in peril is not guilty of negligence toward another which entitles the latter to recover for injury suffered in attempting to rescue the former from his peril. (pp. 287, 288.)

Action against G. W. Parsons and Parsons, Rich & Co. to recover for personal injuries sustained by the plaintiff. The trial court directed a verdict for the defendants, and the plaintiff appealed.

E. J. Salmon, N. T. Guernsey and Graham & Morgan, for the appellant.

W. O. McElroy and C. O. McLain, for the appellees.

⁶⁷⁹ LADD, J. The plaintiff had been employed by Parsons, Rich & Co. as a blacksmith. That firm had concluded to enlarge its factory, and on the eleventh day of November, 1898, directed plaintiff, with others, to assist in removing a one-story addition thereto. This addition was about twenty-four feet square, with brick walls running against, not into, the main building. After the roof had been removed they proceeded to take down the north and east walls. The south wall was to be extended as a part of a larger building. After a portion of the east wall had been removed, the other employes went to work elsewhere, but plaintiff continued until the brick had been taken away within a few feet of the ground. He then took out a window frame, and in returning ⁶⁸⁰ through a doorway in the east wall after setting it aside, noticed that Parsons, who had been overseeing the work, and also working with the men, bent over next to the north wall undermining it at the bottom with a five-foot iron bar. He was but twelve or fourteen feet distant, and the wall appeared to be toppling over toward him. Believing Parsons to be in imminent danger, plaintiff seized a piece of scantling two inches by four or six inches and about seven feet long, rushed over and threw it against the wall about two feet from the top, and over a window, to prevent the wall from falling. Parsons immediately rose up and withdrew without serious injury. But the brick against which plaintiff's prop had been placed gave way, letting plaintiff forward, and he was caught by the falling wall, and his leg so crushed that amputation was necessary. The wall was then about ten feet high at one end and eight feet at the other, with an aperture for a window about two and one-half feet wide and five feet high. Parsons was about three or four feet west of this window. Subsequently, in expressing his sympathy with plaintiff, he said to him that but for his coming as he did, he (Parsons) might have been crushed and killed. Upon the

conclusion of the evidence in behalf of plaintiff tending to establish facts as stated, the jury, on motion, was directed to return a verdict for the defendants.

1. A person who seeks to rescue another from imminent danger, thereby imperiling his own life, is not necessarily guilty of contributory negligence. "The law has so high a regard for human life that it will not impute negligence in an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons": *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721. In *Cottrill v. Chicago etc. Ry. Co.*, 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376, an engineer had continued at his post in order to save life, and the court, in reversing the finding of a jury that he was negligent in not jumping from the engine, said: "According to the common appreciation of human conduct and character, this evidence ⁶⁸¹ presents an example of heroic bravery and fidelity of duty at the post of danger most praiseworthy and commendable, and an occurrence worthy of lasting record in the book of heroic deeds. . . . To hold as a matter of law in this case that the deceased was guilty of want of ordinary care and prudence, as the engineer in charge of the locomotive and train, in not jumping off at this crisis and abandoning his engine, from the mere apprehension of uncertain danger, would make a legal precedent very dangerous to the railway service in life and property, and by which it would be exceedingly difficult, if not impossible, to distinguish the cases and the circumstances in which it would or would not be the duty of an engineer to jump off and desert his engine, or to determine in point of time when he should do so, and the necessity or prudence for him to do so": See, also, *Central Ry. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463. Cases involving the rescue of adults as well as infants from imminent danger are numerous, and the principle seems to be well established that he who springs to the rescue of another, encountering great danger to himself, is not to be denounced as negligent, but that the propriety of his conduct is to be left to the judgment of the jury: *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Becker v. Louisville etc. Ry. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459, 22 Ky. Law Rep. 1893, 61 S. W. 997, 53 L. R. A. 267; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60, 42 L. R. A. 842; *Thompson's Com-*

mentaries on Negligence, sec. 198. See *Liming v. Illinois Cent. R. Co.*, 81 Iowa, 246, 47 N. W. 66.

2. But negligence on the part of the defendant either toward the person rescued or the party making the rescue after the attempt has been begun is essential to a recovery in all cases. This was illustrated in *Evansville etc. R. R. Co. v. Hiatt*, 17 Ind. 102, where a son undertook to rescue his father from in front of a moving train on a bridge, and recovery was denied for that the ⁶⁸² employés of the railroad company did not observe either in time to avoid a collision. In *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594, the court, in considering the liability of the company for injury to a mother in attempting to rescue her child, perspicuously states the principles governing cases of this character: "It is to be observed that only when the railroad, by its own negligence, created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to danger in an effort to rescue such person, and recover for an injury he may sustain in that attempt. For instance, a man is lying on the track of a railroad, intoxicated or asleep, but in such a position that he cannot be seen by the men managing an approaching train, and they had no warning of his situation, and another, seeing his danger, should go upon the track to save his life and be injured by the train, he could not recover unless the trainmen were guilty of negligence with respect to the rescuer, occurring after the beginning of his attempt. If the railroad company is not chargeable with negligence with respect to the person in danger, the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct toward him and his making the attempt. In other words, the negligence of the company as to the person in danger is imputed to the company with respect to him who attempts the rescue, and, if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer after his efforts to rescue the person had commenced": See, also, *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684. It is not pretended that plaintiff was not assigned a safe place to do his work, nor is it claimed there was any want of care with respect to him after he began his efforts to sustain the wall with the stick. But was there any negligence on the part of defendants toward Parsons, the person rescued? The law of negli-

gence is based on the relative rights and duties of one person toward another. Says Judge Thompson, in his Commentaries ⁶⁸³ on the Law of Negligence, section 3: "An essential ingredient of any conception of the law of negligence is that it involves the violation of a legal duty which one person owes another—the duty to take care for the safety or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Therefore, it is reasoned that a plaintiff who grounds his actions upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty the defendant owed to him." These principles are of universal recognition in text-books and decisions.

Undoubtedly Parsons owed the moral duty of protecting his own person from harm. But the love of life is regarded as a sufficient inducement to self-preservation, all that is deemed essential for the government of persons in matters affecting themselves alone. Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself. It matters not whether he (Parsons) was vice-principal or fellow-servant, as he voluntarily undertook on his own motion to undermine the wall. This endangered no one's life but his own. If he was in peril, it was because he placed himself there. There was no negligence on the part of either defendant as to him, and for this reason there could have been none as to his rescuer. To illustrate: suppose a person with intent to suicide should jump into the river, and another, seeing his peril, but without knowledge of his intent, should leap in after him and in attempting to save him be injured. Would anyone contend that the latter could recover the damages resulting from the former or his administrator? Certainly not, and for the reason that negligence could not be imputed to the suicide. His was the dereliction of a moral, not a legal, duty to himself; for to take one's own life, though a crime at the common law, is not so declared by our code. It may be said, however, that Parsons ought, ⁶⁸⁴ in placing himself in peril, to have anticipated that someone would, upon discovering his danger, undertake to shield him from harm. But this was a contingency which, as it seems to us, would not be likely to be contemplated. In the first place,

there is nothing in the record to indicate that Parsons, in the exercise of ordinary care, could not have undermined the wall with safety to himself. That he so intended must be presumed, for the presumption in favor of prudence is always to be indulged until the contrary appears. If, then, he might have performed the work with safety to himself, neither he nor the company is chargeable with negligence for not anticipating that he would do it otherwise, and that, if he so did, somebody would attempt to rescue him. Nor is the probability of receiving such assistance a matter which a person of ordinary diligence, in undertaking a perilous enterprise, would be likely to take into consideration. Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives. Though history teems with accounts of heroic conduct and self-sacrifice, deeds of this kind have not become so common that they are to be anticipated as likely to occur whenever opportunity is afforded. The instincts of self-preservation still so dominate human conduct that acts like that under consideration, in which life itself was risked for the protection of another, are of such rare occurrence as always to command the special attention and admiration of the entire community, and by the common voice of mankind those who do them are singled out as worthy of enrollment on the scroll of heroes. Because of their infrequency, however, it cannot be said they should enter into the calculations of men as at all likely in the ordinary transactions of life. As they spring from magnanimity, magnanimity must be relied upon in cases like this for reparation.

Affirmed.

The Conditions Necessary to Entitle One to Recover for injuries suffered in rescuing another from danger are: That the peril of the person whose rescue is sought shall be due to the negligence of the defendant, and that the rescue shall not be attempted in such a manner, or under such circumstances, as to constitute recklessness. When these two conditions are present, a recovery can be had: Pittsburg etc. Ry. Co. v. Lynch, 69 Ohio St. 123, 63 L. ed. 504, 68 N. E. 703, 100 Am. St. Rep. 658, and cases cited in the cross-reference note thereto.

HOFF v. SHOCKLEY.

[122 Iowa, 720, 98 N. W. 573.]

INDEPENDENT CONTRACTOR, Liability of Land Owner for Negligence of.—If the owner of property employs another to build a house thereon, and the latter causes sand to be hauled and piled up in the street in front of the premises, and negligently leaves the pile of sand unmarked by danger signals of any kind, whereby another driving along the street, at night, in a buggy, is overturned and injured, the land owner is not liable, because the negligence is not that of a servant, but of an independent contractor. (p. 293.)

APPEAL AND ERROR.—The Failure to Perfect an Appeal at the Term specified in the notice does not entitle the respondent to a dismissal, nor prevent the notice from being operative to give the appellate court jurisdiction. (pp. 295, 296.)

Action to recover for personal injuries. Verdict and judgment for the plaintiff; the defendant appealed.

James A. Merritt and J. K. Macomber, for the appellant.

Carr, Hewitt, Parker & Wright, for the appellee.

⁷²¹ **McCLAIN, J.** The defendant, Mrs. Shockley, procured a building permit from the proper city authorities for the erection of a dwelling-house on her lot abutting upon a paved street, and then made a written contract with one Wynburn to construct such house, the contractor to furnish all the labor and material, except brick, which was to be furnished by defendant. In the course of the work, Wynburn caused sand to be hauled and piled up in the street in front of defendant's lot, the place for depositing it being selected with the approval of defendant's husband. This pile of sand being left unguarded and unmarked by danger signals of any kind, the plaintiff, driving along the street at night in a buggy with his wife, drove upon it and the buggy was overturned, and plaintiff's wife was thrown out and injured. Wynburn and two others were made codefendants with Mrs. Shockley, but the action was dismissed or abated with reference to the two other defendants, and verdict and judgment for four thousand seven hundred dollars were returned and entered against Mrs. Shockley and Wynburn. As Wynburn does not appeal, the case will be treated as one against Mrs. Shockley alone.

The sole question necessary to consider is whether, under the facts, as to which there is practically no dispute, defendant is liable for what may be conceded to have been the neg-

ligence of Wynburn in allowing the pile of sand to remain in the street unguarded, and in such condition that plaintiff, in the exercise of reasonable care, drove his buggy upon and over it, and the injury complained of resulted proximately therefrom. It is clearly established by the evidence that Wynburn was an independent contractor, and it is unnecessary to cite authorities to the general proposition that one ⁷²² who employs another to do a piece of work according to the methods to be adopted by the latter, and without reservation of control on the part of the employer, except as to the result of the work done, is not liable for injuries suffered by a third person by reason of the negligence of the contractor in carrying on the work. There are qualifications of the rule thus broadly stated, which need not be here discussed. This case does not fall within any such qualifications or exceptions, unless it be some exception or qualification predicated upon the fact that defendant was the owner of the premises on which the improvement was being made, and allowed a dangerous obstruction, created through the contractor's negligence, to exist in the street in front of such premises.

Such a state of facts was held in *Bush v. Steinman*, 1 Bos. & P. 404, to render the owner of the premises liable, and if the doctrine there announced has been adhered to in subsequent decisions, and remains a correct exposition of the law, then the judgment against the defendant is well founded. As the case cited is typical, it will facilitate the discussion to quote the statement of facts from the report: "The defendant, having purchased a house by the roadside (but which he had never occupied), contracted with a surveyor to put it in repair for a stipulated sum; a carpenter, having the contract under the surveyor to do the whole business, employed a bricklayer under him; and he, again, contracted for a quantity of lime with a lime burner, by whose servant the lime in question was laid in the road." Under this state of facts, the lord chief justice of the English court of common pleas, before whom the case was tried, was of opinion that the defendant was not answerable for the injury sustained by the plaintiff by reason of the lime being piled in the highway. But to get the case before the full bench, a verdict was taken for the plaintiff, with leave to defendant to move for a nonsuit. After full consideration, the court agreed that the action could be maintained, although the chief justice still entertained doubts as to the precise principle on which the verdict should be sustained. The rule adopted by

the court is ⁷²³ most clearly stated by Rooke, J., who says: "He who has work going on for his benefit and on his own premises must be civilly answerable for the acts of those whom he employs. According to the principle of the case in 2 Lev. (Michal v. Ales-tree), it shall be intended by the court that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and, if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It will be noticed that the learned judge rendering the opinion substantially ignores the distinction between the case of master and servant and one of independent contractor. But in view of the full recognition which the doctrine of independent contractor has received in the modern cases, the conclusion of the court in *Bush v. Steinman*, 1 Bos. & P. 404, is to be supported, if at all, as establishing an exception to the effect that the owner of fixed property owes a duty to make the premises safe, regardless of whether the unsafe condition complained of results from the negligence of himself or his servants, or from the negligence of an independent contractor and his servants. But, as applied to a case of a dangerous nuisance in the highway in front of the owner's premises, not caused by the act of the owner, nor of persons for whose acts he is responsible as master or employer, this doctrine has not been accepted by the authorities. The courts of England have expressly refused to follow the case of *Bush v. Steinman*, 1 Bos. & P. 404, and it has been distinctly and unanimously disclaimed as authority in this country: *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Boswell v. Laird*, 8 Cal. 469, 494, 68 Am. Dec. 345; *King v. New York Cent. etc. Ry. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. As is said in *Hilliard v. Richardson*, just cited: "*Bush v. Steinman* is no longer law in England. If ever a case can ⁷²⁴ be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of the clear-headed judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of defendant having created

or suffered a nuisance upon his own land, to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—a rule which ought to have been, and was, expressly repudiated.”

The contention of counsel for the appellee seems to be this: Defendant should have known that the carrying on of the work by the contractor would involve the deposit of sand in the street, and, while this would not necessarily and of itself constitute a nuisance, it might become a nuisance by reason of failure to properly guard it or warn against it, and the defendant should have taken pains to see that the contractor took proper precautions. But such an argument, if acceded to, would require conclusions which are wholly untenable. The defendant must have known that it would be necessary for the contractor to drive his wagons along the street in front of defendant's premises, and thereby, to some extent, obstruct the use of the street while they were being unloaded. And yet could it be claimed that the negligence of the contractor in so driving his wagons or managing them as to injure persons using the street would render the defendant liable? The street was a public highway, and the contractor used the street in carrying out his contract subject to the same limitations as those imposed upon others in the use of a public highway. But it was not the concern of the defendant how the contractor used the street, nor did defendant have any control over the use which the contractor should make of the street. He might, perhaps, have gotten permission to ⁷²⁵ use the adjoining lot for the purpose of piling his material thereon, or he might have mixed his sand and lime at another place, and transported the mortar to defendant's premises as it was needed, or he might have carried out his contract in any other manner which seemed to him feasible and proper. It was not incumbent on the defendant to stipulate how he should do his work. The real negligence complained of was the failure to put out barriers or warning lights, and this was not an act as to which the defendant had any responsibility, or over which defendant had any control. Even if defendant's husband acted as her agent in approving the placing of the sand in the street, his assent did not render her liable, for the placing of the sand in the street was not a wrong in itself: *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep.

831, 14 N. E. 264. Such an act may be entirely proper, and does not necessarily give rise to a nuisance. The wrong was in leaving the pile of sand in the street at night without barricade or danger signals, so as to imperil the safety of those using the street in the usual way. For this neither defendant nor her husband was responsible.

The conclusion which we reach—that defendant was not chargeable with the consequences of the contractor's negligence—is supported by the great weight of authority. For instance, in *Wright v. Big Rapids Door etc. Mfg. Co.*, 124 Mich. 91, 82 N. W. 829, 50 L. R. A. 495, it was held that a property owner was not liable for the act of an independent contractor in negligently piling lumber near the owner's premises. In *Sanford v. Pawtucket Street R. Co.*, 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564, it was held that the defendant, a street-car company, was not liable for negligence of an independent contractor in stretching a rope or wire across a public street in the construction of the road. In *Leavitt v. Bangor etc. Ry. Co.*, 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382, it was held that the defendant company was not liable for damages by fire communicated from the cooking-car used by an independent contractor engaged in cutting wood for the company, although the car ⁷²⁶ stood on the company's track. In *Berg v. Parsons*, 156 N. Y. 109, 66 Am. St. Rep. 542, 50 N. E. 957, 41 L. R. A. 391, it was held that the negligence of a contractor in blasting rock on defendant's premises, causing damages to a building upon the adjoining lot, did not make the defendant responsible. In *Smith v. Benick*, 81 Md. 610, 41 Atl. 56, 42 L. R. A. 277, it was held that the proprietor of a public resort employing an independent contractor to make a balloon ascension to attract visitors, was not liable for injury to a visitor by a pole which fell because of the negligence of the contractor in endeavoring to raise the pole for use in inflating his balloon. In *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065, it was held that the owner of a public building was not liable for the negligence of a contractor in putting a stairway into such temporary condition that it was dangerous to persons using it. In *City of Richmond v. Sitterding (Va.)*, 43 S. E. 562, it was held that the owner of premises was not liable for injuries resulting from the negligence of an independent contractor in placing a plank in the street in front of the premises so as to create an unlawful obstruction. In *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386, it was held that the owner of a building was not

liable for the negligence of the servant of an independent contractor at work on the building in dropping an iron ball from the roof to the street below. Similarly, in *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755, it was held that the owner of a building was not liable for the negligence of a contractor in allowing a plank to fall from the cornice of the building, which was in process of erection, to the sidewalk below. In *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139, 772, it was held that the owner of a building in process of erection, intrusting to an independent contractor the work of laying pipes in the street, connecting with the building, was not liable for the negligence of the contractor in tearing up the sidewalk in the prosecution of his work, and leaving it in such condition as to be dangerous to persons passing by. In ⁷²⁷ *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699, it was held that the owner of premises was not liable for an injury resulting from the negligence of an independent contractor in leaving open for a short time a coal-hole in the sidewalk in front of the premises. And in *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743, which has already been cited, it was held that the owner of land, employing a carpenter as an independent contractor to alter and repair a building and furnish the materials for the purpose, was not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the contractor. Other illustrations are furnished by cases which are cited in 1 Thompson's Commentaries on the Law of Negligence, section 620 et seq. The conclusions which we reach are in harmony with the doctrine as announced by this author. This court has recognized the same principle in *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385, in which the court reverses on account of an instruction extending the rule of respondeat superior to the act of a servant or employé when the master or employer, by the terms of the employment, has no authority to control and direct the manner of the execution of the work; and the court says that if the employer has no control over the workmen, or the manner of doing the work, he is not liable for their negligence—such as the throwing of earth from a ditch onto a public street, or the leaving of an unfinished ditch open during the night.

In the view which we take of the case before us, the authorities relied on by appellee are not in point. They are cases where a person is charged with maintaining premises

in a safe condition for others—as, for instance, where the owner of a building is required to have his premises safe, or a city, having control of its streets, is required to maintain them in a safe condition for the use of the public. If the thing contracted to be done involves, as a direct consequence, a danger which the owner of the premises or the city is bound to avoid or to provide against, then the delegation of the work to an independent contractor will not relieve from liability ⁷²⁸ for consequences proximately resulting from negligence in doing the thing thus contracted to be done. As furnishing illustrations of this rule of liability, which is wholly distinct from the rule as to the negligence of an independent contractor in carrying on the work contracted for, see *Railroad Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; *Woodman v. Metropolitan Ry. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427, 21 N. E. 482, 4 L. R. A. 213; *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Chicago v. Robbins*, 2 Black (U. S.), 418, 17 L. ed. 298; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437. The cases of *Van Winter v. Henry Co.*, 61 Iowa, 685, 17 N. W. 94, and *Wood v. Independent Dist.*, 44 Iowa, 27, illustrate this distinction and it is clearly pointed out in *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427, in which this language is used: "Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of wrongful acts of the contractor or his workmen, the rule is that the employer is not liable. But where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts, is equally liable to the injured party." And see *Palmer v. City of Lincoln*, 5 Neb. 136, 25 Am. Rep. 470, where the same distinction is made.

The trial court therefore erred in submitting the case to the jury on the theory that the defendant was liable for the negligence of Wynburn in not sufficiently protecting the public, including the plaintiff and his wife, from the danger incident to putting the pile of sand in the street in front of defendant's premises, and leaving it unguarded.

Counsel for appellee urge the insufficiency of the notice of appeal, on the ground that no appeal was perfected at the term of the supreme court to which, by the terms of the notice, the appeal was taken. But we have never held that failure

to get the case into ⁷²⁰ the supreme court for the term specified in the notice was a ground for dismissal, or that the notice became inoperative to give this court jurisdiction on that account. Objection is also made to the form of the notice, but we find that, as set out in appellant's abstract, it is sufficient. Reversed.

Bishop, J., takes no part.

If an Independent Contractor leaves a street in a dangerous and unguarded condition, the property owner is liable for injuries sustained by third persons: McCarrier v. Hollister, 15 S. Dak. 366, 91 Am. St. Rep. 695, 89 N. W. 862; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231; monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 406. But see Richmond v. Sitterding, 101 Va. 354, 99 Am. St. Rep. 879, 43 S. E. 562.

BROWN v. TAMA COUNTY.

[122 Iowa, 745, 98 N. W. 562.]

PUBLIC OFFICER—Payment of Salary to a De Facto Officer as a Defense to an Action by an Officer De Jure.—If the salary is paid to an officer de facto during his incumbency in the office, but while an action contesting his right is pending, which finally terminates in an action declaring another to be, and to have been, entitled to the office, the latter cannot recover such salary from the county so paying it. (p. 304.)

Caldwell & Walters, for the appellant.

R. P. Kepler and C. B. Bradshaw, for the appellee.

⁷⁴⁶ **WEAVER, J.** The petition alleges that, at the general election for the year 1899, plaintiff and one De Long were opposing candidates for the office of superintendent of schools for Tama county; that the board of canvassers declared plaintiff elected by a majority of three votes, and that thereupon De Long instituted a contest as provided by law, which contest was still pending and undetermined on January 1, 1900, on which day "plaintiff had a bond prepared and took the oath of office, but because of the pendency of said contest did not file said bond until April 12, 1900." On January 2, 1900, the court of contest decided that De Long had received

a majority of the votes and was duly elected. From this decision plaintiff appealed to the district court, where the finding in favor of De Long was affirmed, but on further appeal to this court the finding of the district court and court of contest was reversed. On being remanded to the district court the case was again tried, and final judgment entered in plaintiff's favor on June 21, 1901. Three days thereafter plaintiff's bond was approved by the board of supervisors, and he entered upon the duties of the office. Plaintiff alleges that from the beginning of his term—January 1, 1901—he was at all times ready and able and willing to take possession of the office and discharge its duties, and was prevented from so doing by the contest aforesaid. He further avers that during this interval De Long was actually engaged in the performance of said duties an aggregate of four hundred and sixty-three days, during all of which time plaintiff was entitled to the fees, salaries, and emoluments of said office, and would himself have performed the labors and duties thereof had he not been prevented by the wrongful contest above mentioned. He therefore demands judgment against the county for the per diem ⁷⁴⁷ compensation provided by law on the basis of the number of days' services performed by De Long during the term for which plaintiff was elected. Attached to the petition is a copy of plaintiff's bill or claim, as presented by him to the board of supervisors before the institution of this action. It sets out an itemized statement of the time during which De Long is alleged to have been engaged in performing the duties of superintendent of schools after plaintiff became entitled to the office, and is verified by an affidavit as follows:

"The above and foregoing bill shows the number of days in which one C. A. De Long was actually engaged in the performance of the duties of county superintendent of schools of Tama county, Iowa, as a de facto officer from January 1, 1900, until June 24, 1901, and is the actual statement of the fees, salary, and emoluments of said office for that period; that during said period this claimant, D. E. Brown, was entitled to said office and was the de jure officer, but was wrongfully excluded from said office by the said C. A. De Long by means of a contest wrongfully instituted by the said C. A. De Long, and carried on in the courts until said contest was finally determined on the 21st of June, 1901. All of which was and is well known to the members of this honorable board of supervisors both severally and collectively.

"State of Iowa, }
Tama county. } ss.

"I, D. E. Brown, on oath do say that the above account is just and true and the service rendered as herein set forth, and that the same has not been paid, or any part thereof, to said D. E. Brown.
D. E. BROWN."

To this pleading the defendant interposed a demurrer substantially as follows: 1. It shows that plaintiff did not qualify or become entitled to the office until June 24, 1901; 2. It shows that, during all the time for which plaintiff demands pay, De Long was the actual incumbent of the office, and performed all its duties, and plaintiff performed no official service whatever; 3. While it shows that plaintiff received a majority of the votes and was given a certificate of election by the board of canvassers, it does not show a sufficient ⁷⁴⁸ or legal excuse for his failure to qualify and take possession of the office and perform its duties; and 4. It states no fact showing that plaintiff was wrongfully excluded from the office, or prevented from performing the duties thereof.

This demurrer was sustained by the trial court, and plaintiff, electing to stand upon his petition without amendment, judgment was entered against him for costs, and he appeals.

To better define the issue of law thus presented, the parties stipulate that the defendant county had paid De Long the full per diem compensation allowed by law to superintendents of schools for each and every day of service rendered by him in said office during the period between January 1, 1900, and June 24, 1901, and that such payments were made by order of the defendant board of supervisors with full knowledge on their part of the pendency of the contest on appeal. It is also agreed that the demurrer be considered and disposed of as if the stipulated facts were set out in the petition.

1. County superintendents of schools are regularly elected each odd-numbered year, and are entitled to hold office for two years: Code, sec. 1072. The term of office regularly begins upon the first Monday in January after an election is had: Code, sec. 1060. Each superintendent is required to give an official bond in a sum to be fixed by the board of supervisors. Except when prevented by sickness or inclemency of weather, he is required to qualify before noon of the first Monday in January after his election by taking the prescribed oath of office and giving the required bond: Code, sec. 1177. It is made a

misdemeanor, for any officer who is required to give bond to act in such official capacity without having first given such bond: Code, sec. 1197. The right to hold a county office to which a person has been declared elected may be contested before a tribunal duly organized for that purpose: Code, tit. 6, c. 7. From the decision of this tribunal an appeal may be taken, but, if the party appealing is already in ⁷⁴⁹ possession of the office, the appeal will not prevent his ouster under the judgment appealed from, unless he gives bond, in at least double the probable compensation of the office for six months, conditioned that he will prosecute his appeal without delay, and if the judgment appealed from be affirmed he will pay over to the successful party all compensation received by him while in possession of said office after said judgment was rendered: Code, sec. 1222. The foregoing constitutes all the statutory provisions which need be looked to in determining the legal relations of plaintiff and contestant, in respect to the office, pending the litigation between them. We have cited them, not because they afford any specific remedy for the wrongs of which plaintiff complains, but to make clear that this state has no statute which prevents due consideration by us of the rules and principles which have been recognized in this class of cases by courts of other jurisdictions.

2. With the admitted facts and the statutory provisions applicable thereto thus before us, the central question to be considered may be stated as follows: Where, during the incumbency of a county officer *de facto* under color of title, the county pays him the salary provided by law, can the officer *de jure*, after obtaining possession of the office under final judgment of ouster, maintain an action against the county for payment to himself of the salary for the same period? The decision of the courts upon this and cognate questions have developed a marked lack of harmony, and have been said by Mr. Freeman to be "incapable of reconciliation." The same distinguished annotator, while expressing his own dissent from the rule, says: "If, during the incumbency of an officer *de facto*, and before any judgment of ouster has been rendered against him, the city or county of which he is such an officer *de facto* pays him the salary of the office, a very decided preponderance of authorities sustains the position that by means of such payments the right of the officer *de jure* to collect his salary from such city or county is lost": See note to *Andrews v. Portland*, 10 Am. St. Rep. 280, ⁷⁵⁰ which cites *Auditors v. Benoit*, 20

Mich. 176, 4 Am. Rep. 382; *State v. Clark*, 52 Mo. 508; *Smith v. Mayor*, 37 N. Y. 518; *Westberg v. City of Kansas*, 64 Mo. 493; *McVeany v. Mayor*, 80 N. Y. 185, 36 Am. Rep. 600; *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168; *Steuenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Shannon v. Portsmouth*, 54 N. H. 183; *Commissioners v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171. The only cases noted by Mr. Freeman as sustaining the opposing view are *Andrews v. Portland*, 10 Am. St. Rep. 280, note; *Memphis v. Woodward*, 12 Heisk. 499, 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea, 46; *People v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193.

It is to be said of several, if not all, of the cases last cited, that they present a materially different state of facts than we have here to pass upon. For instance, the plaintiff in the *Andrews* case was duly appointed and qualified city marshal, and had long been in the actual possession of the office, when he was wrongfully excluded therefrom by the action of the city officers, after which he not only remained ready to perform, but offered to perform, the duties to which he had been appointed; and it was held that he was entitled to recover his salary for the full term, although the marshal *de facto* had also been paid. So, also, in the *Memphis* case, a person had been duly elected hospital physician, had taken the oath, and his official bond had been accepted, and thereafter when calling upon his predecessor to take possession of the office, the latter asked and was granted a few hours' delay for the purpose of removing his family from the building, and improved the opportunity thus given to obtain a writ of injunction by means of which he kept the rightful claimant out of possession for several months. Assuming, for the present argument, that under such exceptional circumstances the city or county cannot avoid liability to the rightful officer by paying the salary of the office to a flagrant usurper, we think a different rule may obtain where the officer *de facto* is in possession under a *prima facie* good title. In the case before us the plaintiff never took possession of the office till after ⁷⁵¹ the final decision, June 21, 1901, nor had ever tendered his official bond or demanded possession of the office until April 12, 1901, after the decision of his appeal to this court. During all this period De Long was in the actual occupancy of the office under the judgment of the court of contest and of the district court, giving him an apparently good title (subject, of course, to the decision of the appeal). So far as is shown, while all knew of the pendency of the appeal, De

Long and the board of supervisors and the disbursing officers of the county acted in entire good faith, believing him the rightful occupant of the office. Under such circumstances, is there any sound principles of law or policy requiring the court to compel the public, which had once in good faith paid the full value of the services to the person who performed them, to again pay the same debt, for the same services, to one who confessedly did not perform them?

The opinion by Andrews, J., in the Dolan case (68 N. Y. 274, 23 Am. Rep. 168) is instructive on this point. Speaking of the officer *de facto* who received the salary of the office before being finally ousted, it says: "The appointment of Keating was not a plain usurpation, without legal pretext or color of right. The statute was obscure, and the power of the justice to remove an incumbent at pleasure and make a new appointment was a question upon which the courts differed, and, although it has been finally decided that it did not exist, Keating was an officer *de facto* within the authorities." After conceding that the *de facto* officer had no right to the salary, and could not have compelled payment to himself by suit, the opinion proceeds: "But it does not follow from the conclusion that defendant could have successfully defended an action brought by Keating to recover the salary of assistant clerk that it was not justified in treating him as an officer *de jure* when claiming it and paying it upon that assumption. It is clear that if the city could rightfully pay the salary to Keating during his actual incumbency, and has paid it, it cannot be required to pay it again to the plaintiff. We are of the opinion that payment to a *de facto* public officer of the salary of the office, ⁷⁵² made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession. . . . It is plain that in many cases the duty imposed upon the fiscal officers of the state, counties, or cities to pay official salaries could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certifying the election of a person to an elective office is *prima facie* evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown, and another person is adjudged to be rightfully entitled to the office. This can seldom, if ever, be ascertained except after judicial inquiry. . . . If fiscal offi-

cers upon whom is imposed the duty to pay official salaries are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary the second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission, and investigate and ascertain the real right and title. Disbursing officers charged with the payment of salaries have, we think, the right to rely upon the apparent title and treat the officer who is clothed with it as an officer *de jure*, without inquiring whether another has a better right. Public policy accords with this view. . . . This does not deprive the party who has been wrongfully deprived of the office of a remedy. He may recover his damage for the wrong against the usurper."

Entirely parallel in all material facts with the case at bar is *Commissioners v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171, decided by the supreme court of Kansas. The contest there was over the election to the office of county clerk. Anderson received the certificate of election, and took possession of the office. The contest ⁷⁵³ court decided for the contestant, Wildman, who then ousted Anderson. On final decision of the appeal the judgment of the contest court was reversed and Anderson's title to the office was sustained. Meanwhile, during the pendency of the appeal, Wildman held possession of the office, and drew the salary accruing from time to time. After being restored to the office, Anderson brought suit to compel payment to himself of the salary during the time he was out of possession. The court, by Valentine, J., in holding there was no right of recovery, says: "Now, as Wildman was an officer *de facto*, holding under color of title, every person had a right to recognize him as a legal and valid officer and treat him as such. The public, the county, and private individuals had a right to do business with him as an officer, and to pay him for his services, if they chose, without taking any risk of having to pay for such service a second time. . . . It is not their fault that he is wrongfully in possession of the office, and how are they to know whether he is in possession of the office rightfully or wrongfully?"

In *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382, another case of similar character, the Michigan court, after a very thorough examination of the question both upon principle and

precedent, reach the same conclusion. In still another parallel case—*State v. Milne*, 36 Neb. 301, 38 Am. St. Rep. 724, 54 N. W. 521, 19 L. R. A. 689—the authorities are again marshaled with the same result, the court saying: “The doctrine that the acts of a de facto officer are valid, as far as they affect third parties and the public, is so familiar that no citation of authorities is necessary to show it. The acts of such officer are sustained upon the ground that to question them would devolve upon any person transacting business with the officer the duty of determining at his peril the right of the incumbent to the office he holds. Third parties assume no such risk. They are not bound to know that the person exercising the functions of a public office under color of authority is rightfully in possession of the office, but are warranted in ⁷⁵⁴ recognizing him as the legal and valid officer, and are justified in dealing with him as such. If a person pays to a de facto officer fees allowed by law for his services, he is protected, and will not be required to pay them a second time to the officer de jure. We think the same principle should govern cases like the one at bar. Cashman was the de facto county treasurer of Greely county, and performed the duties of the office under color of title from January 9, 1900, to October 28, 1901, during which time he received all the emoluments which attached to the office. He took possession of the office in good faith by virtue of the decision in his favor by the contest court, and continued to occupy the office until the respondent was declared to be entitled to the same by virtue of a judgment of ouster obtained by him against Cashman on the final determination of the contest case. The county board, in settling with Cashman, and allowing him the fees and salary provided by law for the period during which he performed the duties of the office, the same having been made before respondent came into possession, had a right to rely upon the apparent title of Cashman, and to treat him as an officer de jure. The board was justified in allowing him the emoluments of the office upon that assumption, and the county cannot be compelled to pay them twice.” Bearing in the same direction, also, are *Shaw v. County of Prima*, 2 Ariz. 399, 18 Pac. 273; *Gorman v. Boise County*, 1 Idaho, 655; *Parker v. Dakota*, 4 Minn. 59 (Gil. 30); *Michel v. New Orleans*, 32 La. Ann. 1094; *McAffee v. Russell*, 29 Miss. 84; *Chandler v. Hughes Co.*, 9 S. Dak. 24, 67 N. W. 946.

It is not to be denied that this rule may sometimes result in hardship to one who has been wrongfully excluded from an

office to which he has been duly elected or appointed, but the hardship comes not from any wrong which has been done him by the state, county, or city whose officer he is, but from the wrong or fault of the individual who, without sufficient grounds, has disputed his right and taken the emoluments which rightfully he should have received. The public is interested in having the offices provided by law filled at all times by persons to whose official acts full faith and credit ⁷⁵⁵ may be given. Individual citizens and other officers having business with any given office should be and are protected in dealing with the person actually and notoriously in possession of the same under color of title, and peaceably exercising its functions. Even though it be well known that a contest is pending, the de facto officer may go on discharging the duties of the office, and third persons and the public may deal with him as the officer de jure. They are not required to enter into the contest, nor to feel that the validity of the officer's acts in the performance of the duties of the office hangs in suspense upon the outcome of the contest. If the compensation of the office be one like that of the office of justice of the peace or constable, to which no salary is attached, but consists wholly of items of fees and costs earned and collected from day to day, the person who is liable therefor may pay them to the officer who performs the service, without fear of being required to pay them again to a successful contestant who afterward establishes his right to such office. This proposition we presume no one will dispute; and it is difficult to conceive why a different principle should be applied to a case where the de facto officer receives his compensation by way of a per diem allowance out of the public treasury. Neither the county which pays the officer's charges from its public treasury, nor the private citizen who pays the officer's fees from his private purse, is a party to the contest, and neither is bound to anticipate the outcome, or to deal with the de facto officer at its peril. The litigation is the private and individual concern of the parties thereto, and not until they have fought their contest to a finish and a final adjudication is had, and the rightful claimant is in position to assume the actual occupancy of his office, need the citizen or county refuse to treat with the de facto incumbent as if he were an officer de jure. Any other rule would tend to uncertainty, confusion, and endless litigation in the conduct of public affairs. The party to whom such a contest brings undeserved injury or loss must look for his damages to the person who caused it.

756 We do not attempt any general review of these cases. As indicated at the outset, they are not to be harmonized; and believing, as we do, that the rule, which is conceded even by its critics to be sustained by a preponderance of authority, is also consonant with sound reasoning and with public policy, we adopt and apply it. That rule is not inconsistent with any previous decision of this court. The case of *McCue v. Wapello*, 56 Iowa, 698, 41 Am. Rep. 134, 10 N. W. 248, cited by appellant, is no exception to this statement. The action there was brought by one who had been an officer *de facto*, but had been ousted, to recover for services rendered while serving in such *de facto* capacity. A recovery under such circumstances would be, we think, wholly without precedent. The New York court, in the *Dolan* case, recognizes this principle, and, while holding that the officer *de jure* cannot, after obtaining possession of his office, compel payment to himself of a salary which has once been paid to the officer *de facto* while actually in possession, distinctly affirms the rule of the *McCue* case, that an officer cannot compel the payment of the salary to himself without showing good title to the office, and that all salary and charges for official services by said officer accruing during the *de facto* incumbency, and remaining unpaid when the wrongful occupant is finally ousted, are payable only to the officer *de jure*. The rule, to which we adhere, is not to be invoked by the *de facto* officer for his own advantage, as *McCue* sought to do in the case referred to. As the court there says: "These doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure*." In the *McCue* case plaintiff had, while still in possession of the office, received payment from the county in a considerable sum for official services, and had Stewart, the officer *de jure*, brought suit after his restoration to compel the county to pay this sum a second time, then we should have a case in point with the one at bar. The distinction is in our judgment a proper one, and the principle of the earlier case can well be adhered to without in any manner calling for a reversal in the case before us.

757 We have also held that the right to recover the compensation or salary attached to an office "depends upon the performance of the duties, or, at least, there must be possession of the office in fact, as distinguished from the mere right of possession": *Jayne v. Drorbaugh*, 63 Iowa, 717, 17 N. W. 436. The county is something more than a mere stakeholder between

the contending parties, and its rights in the premises are not necessarily dependent upon the adjudication between the contending claimants. It is to the public interest that it shall be permitted to recognize officers *de facto* in possession of their offices under color of right, and until a final adjudication in favor of a contestant it may treat the occupants as officers *de jure*, by an action in their own behalf, could not compel such recognition. In the language of Campbell, C. J., in *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382: "Nothing but actual incumbency can make a legal officer, however much he may be entitled to obtain the office. . . . The only valid proceedings in the name of the office must be those of the actual incumbent." If the public generally are entitled to deal with the incumbent (even pending contest) without fear that such dealings will be invalidated by a subsequent adjudication of the right to the office in favor of a contestant, it is equally proper and important that the organized public—state, county, or city—may also deal with him with equal safety. As said by Chief Justice Campbell in the case above cited: "There may be cases where the redress of the aggrieved party will be difficult. But the public convenience is not on that account to be sacrificed. It is important to have the right man in office, but it is more important to deal safely with those who are actually in place. And there would be a great hardship in allowing public interests to be thrown into confusion whenever a contest arises for office. It would invite rather than prevent litigation if every claimant understood that by setting up a claim to an office he could stop the salary of the incumbent."

The conclusion thus reached renders unnecessary the consideration of other questions presented in argument.

The judgment of the district court is affirmed.

The Principal Case seems to have the support of the weight of authority. There are decisions however, wherein a different view is taken: See *Coughlin v. McElroy*, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224, and cases cited in the cross-reference note thereto; note to *Andrews v. Portland*, 10 Am. St. Rep. 284.

STATE v. POE.

[123 Iowa, 118, 98 N. W. 587.]

ROBBERY—Indictment—Aggravation.—If an indictment for robbery states the essential facts of the crime, it is not necessary that it further allege circumstances of aggravation in order to warrant the imposition of a penalty provided by statute for the commission of a robbery under aggravated circumstances. (pp. 308, 309.)

EVIDENCE OF GUILT.—Flight is not Presumptive Evidence, but is only a circumstance to be considered in connection with the other evidence in arriving at the guilt or innocence of the accused. (pp. 312, 313.)

Stiver & Slaymaker and J. S. Banker, for the appellant.

C. W. Mullan, attorney general, for the state.

¹¹⁸ **McCLAIN, J.** The indictment charged that defendants made an assault upon one Charles Billington and put him in bodily fear and danger of his life, and that said defendants, being then and there armed with revolver and knife, the same being dangerous weapons, feloniously and unlawfully did rob, steal, and carry away from the person of said Billington, against his will, certain property described. The court charged the jury that if it found the defendants, or either of them, was armed with ¹¹⁹ a revolver and knife, or either of such weapons, with intent, if resisted, to kill or maim the said Charles Billington, or if the defendants, or either of them, being so armed, struck or wounded the said Charles Billington, then the defendants, or either of them, so found guilty, might be punished as specified in Code, section 4754, which provides that "if such offender at the time of such robbery is armed with a dangerous weapon with intent, if resisted, to kill or maim the person robbed, or if being so armed, he wound or strike the person robbed," he may be punished by a term of imprisonment in the penitentiary not exceeding twenty years nor less than ten years.

This instruction is objected to on the ground that the indictment does not charge the aggravated degree of the offense described in the section of the code above referred to, and it is contended that it was error to submit to the jury the question whether defendants were armed with intent, etc., or did, being so armed, wound or strike the person robbed. But it is to be noticed that the statute does not describe different offenses in the nature of robbery. In Code, section 4753, the crime is fully described, without reference to the circumstances of being armed,

etc., while the two following sections prescribed punishments, depending on the presence or absence of the aggravating circumstances under which the crime is shown to have been committed. Therefore it was not necessary in the indictment to charge the circumstances of aggravation, which affect only the measure of punishment that may be inflicted. This conclusion has been reached in Massachusetts, where the statutory provisions are very similar to those found in our code: *Commonwealth v. Mowry*, 11 Allen, 20; *Commonwealth v. Cody*, 165 Mass. 133, 42 N. E. 575.

Although this court may not have expressly passed on the question, yet in *State v. Brewer*, 53 Iowa, 735, 6 N. W. 62, it approved an indictment similar to the one now before us, while in *State v. Callihan*, 96 Iowa, 304, 65 N. W. 150, and in *State v. Osborne*, 96 Iowa, 281, 65 N. W. 159, it treated an indictment charging the essential ¹²⁰ facts of robbery, and also an assault with intent to kill, as not describing more than one offense, and deemed the peculiarities of the assault as unnecessary and surplusage. We think it not required that an indictment which states the essential facts of the crime of robbery shall further state the circumstances of aggravation, in order to warrant the imposition of the penalty provided for in Code, section 4754.

In one paragraph of the charge, the jury was instructed as follows: "It is claimed by the state that the defendants Decker and Poe at once fled, and endeavored to escape arrest by such flight. If you find said defendants at once after the alleged offense fled to Missouri, and endeavored to avoid arrest and prosecution by such flight, such fact would be presumptive evidence of guilt; and if such fact is explained, the jury would be justified in considering such flight as evidence of guilt." The objection urged to this instruction is that the jury may have reasonably understood it as authorizing them to give undue weight to the fact of flight, and to convict on proof of that fact alone.

The fact that defendant fled from the vicinity where the crime was committed, having knowledge that he was likely to be arrested for the crime, or charged with its commission, or suspected of guilt in connection therewith, may be shown as a circumstance tending to indicate guilt, and may be considered by the jury with other circumstances tending to connect the defendant with the commission of the crime, to authorize the inference of the guilt of defendant, the corpus delicti being proven. To this proposition there is general assent among the

authorities, and it is well settled that evidence of flight is admissible: 1 Bishop's New Criminal Procedure, sec. 1250; Abbott's Trial Brief, 458. The admissibility of such evidence depends upon the assumption—which is in accordance with usual human experience—that a guilty person will, and an innocent person will not, attempt to avoid an investigation of a charge of crime; and yet it is well ¹²¹ recognized as a fact that guilty persons do not universally attempt to escape; for, recognizing the danger of such attempt, or relying on the inability of the prosecution to connect them with the crime charged, they may well think it to be to their advantage to defy suspicions or accusations; while, on the other hand, innocent persons, through mere timidity, or by reason of a fear that they may not be able to meet apparent evidence of guilt, may seek to elude arrest for the purpose of escaping or postponing investigation until the excitement has subsided, or facts establishing their innocence may have developed. It is therefore usual and proper, not only to instruct the jury that they may consider evidence of flight with other circumstances tending to show defendant's guilt, but also to advise them as to the weight which should be given to such evidence: Commonwealth v. Berchine, 168 Pa. St. 603, 32 Atl. 109; Elmore v. State, 98 Ala. 12, 13 South. 427; Sewell v. State, 76 Ga. 836.

In State v. Thomas, 58 Kan. 805, 51 Pac. 228, the court approved an instruction that flight of defendant is "a circumstance to be considered, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence." The weight of such circumstances is frequently greatly modified by the conditions shown to have existed as bearing upon the conduct of the defendant; and under such circumstances, such as that the defendant was of immature years or thought himself to be in danger of violence, such evidence is of very little probative force: Mathews v. State, 19 Neb. 330, 27 N. W. 234; Ryan v. People, 79 N. Y. 593.

In the case last cited the court says: "The evidence that the defendants made an effort to keep out of the way of the officer was very slight, if any, indication of guilt. There are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt; but this and similar evidence has been allowed ¹²² upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances." And in Scheffield v. State, 43 Tex. 378, this language is used:

"It was a maxim of the ancient common law that flight from justice was equivalent to guilt. This effect is not now given to flight in the modern law of evidence. Numerous examples are to be found in which some other motive can be assigned than that of guilt, and which form exceptions to the general rule, and require consideration by the jury in coming to a conclusion as to the real motive for flight." It is clear that the circumstance of flight alone will not justify conviction of the defendant, in the absence of other evidence tending to connect him with the commission of the crime, although the corpus delicti may have been sufficiently shown: *Elmore v. State*, 98 Ala. 12, 13 South. 427; *Sylvester v. State*, 71 Ala. 17.

Indeed, it has been held that the court should not say to the jury, in such cases, that flight is evidence of guilt, but, rather, that it is only evidence tending to prove guilt, and accordingly it is said that the court should not instruct the jury that if flight is proved it must be satisfactorily explained, consistently with the innocence of the defendant: *Fox v. People*, 95 Ill. 71.

The last sentence of the instruction above quoted is open to criticism, therefore, in that it might have been reasonably interpreted by the jury as authorizing them to convict the defendant of the crime charged, without other evidence of defendant's guilt than that he had, soon after the commission of the crime, and with knowledge that he was suspected thereof, fled from the vicinity where the crime was committed. The instruction does not incorporate the thought that such circumstance might be explained, but it leaves the jury to infer that, if unexplained, it is sufficient evidence to warrant them in finding that defendant was guilty of the crime. Even if unexplained, such conduct is not, as already pointed out, inconsistent with innocence, but merely a circumstance¹²³ from which, with other circumstances, the inference of guilt may be drawn. This sentence cannot, perhaps, be said to be in itself erroneous as stating a proposition of law; but as the instruction, as quoted, embodies all that was said to the jury on the subject, and in view of the equivocal nature of the evidence relating to the flight, as it will be hereafter more fully referred to, we think that it was calculated to mislead the jury as to the effect which might be given to such evidence.

But we think that the second sentence of the instruction, declaring that flight, if to avoid arrest and prosecution, would be presumptive evidence of guilt, was erroneous and prejudicial. It is sometimes said, for the purpose of explaining why evidence

of flight is admissible at all, and not for the purpose of determining what weight the jury should give to such evidence, that a presumption of guilt arises therefrom. Dr. Wharton, in an article on Presumptions in Criminal Cases (1 Criminal Law Magazine, 10), uses this language: "All evidence, therefore, we conclude, consists of reason and fact co-operating as co-ordinate factors. The facts are presented to us either by inspection, or by what we call judicial notice, or by our knowledge of everyday life, such as is embraced by the term 'notoriety,' or by the descriptive narrative of witnesses. From these facts we draw certain conclusions. The mode by which we draw them is induction, and the processes we term 'presumption.' In other words, a presumption is an inference of a fact from a fact. Of this we may take the following illustration: A man accused of crime hides himself and then absconds. From this fact of absconding we infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact." But in his work on Criminal Evidence (section 750), this author explains the whole matter in language so pertinent to all the phases of this case that we venture to quote him at length: "When a suspected person attempts to escape or evade a threatened prosecution, it may be urged that he does ¹²⁴ so from a consciousness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred. Hence it is admissible for the prosecution to show that the prisoner advised an accomplice to break jail and escape, or that he offered to bribe one of his guards, or that he killed an officer of justice when making such attempt, or that he attempted to bribe or intimidate witnesses. So with flight, to which no proper motive can be assigned, and with acts of disguise, concealment of person, family, or goods, and similar ex post facto indications of a desire to evade prosecution. But it must be remembered that, while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt. Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive, facts will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses

have been suborned to bear false testimony against him; added to all this, more or less vexation must necessarily be experienced by all who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive': Best on Evidence, 5th ed., 578. The question, it cannot be too often repeated, is simply one of inductive, probable reasoning from certain established facts. All the courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred; but this should be qualified by a general statement of the countervailing considerations incidental to a comprehensive ¹²⁵ view of the question. To this effect is the charge of Abbott, J., in *Donnall's Case*, where he told the jury, that 'a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight.' So it is proper to keep in mind, as we have seen, the character of the tribunal before whom, and the mode of criminal procedure in the country where, the trial is to take place. Hence is it that conduct exhibiting indications of guilt should not be received by the court, unless there be satisfactory evidence that a crime has been committed. And in all cases the circumstances explaining or excusing flight are to be taken into consideration."

In the same sense Best, in his work on Evidence, refers to the effect of such evidence (*Chamberlaine's* edition of 1893): "The evasion of justice seems now nearly, if not altogether, reduced to its true place in the administration of criminal law; namely, that of a circumstance, a fact which it is always of importance to take into consideration, and which, combined with others, may supply the most satisfactory proof of guilt, although, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility."

Judge Thompson, in his work on Trials (volume 2, section 2543), explains the matter thus: "It is often inaccurately said that the flight of the accused creates a presumption of his guilt, and this presumption is sometimes inadvertently dealt with as though it were a presumption of law. But it belongs to that class of presumptions which are generally classified as 'presumptions of fact.' If it were a presumption of law, the jury would

be bound to draw it in every case of flight, and the court might so instruct them; whereas it is merely a circumstance tending to increase the probability of the defendant being the guilty person, which, on sound principle, is to be weighed by the jury like any other evidentiary circumstance. In cases where the evidence renders it ¹²⁶ proper, the judge is at liberty to give the jury advice touching the nature of this presumption. The following, approved in a recent case, will, with some correction of phraseology, be a good model: 'The flight of a person immediately after the commission of a crime, or after a crime is committed with which he is charged, is a circumstance in establishing his guilt, not sufficient of itself to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him—the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine, in connection with all the facts called out in the case': *McClain v. State*, 18 Neb, 154, 158, 24 N. W. 720. The following, from another recent case, is more concise, and perhaps better: 'Evidence has been introduced as to an attempted escape from jail, by the defendant, while in the custody of the sheriff of this county on this charge. If you find from the evidence that defendant did thus attempt to escape from custody, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence.' Approved in *Anderson v. State*, 104 Ind. 467, 472, 4 N. E. 63, 5 N. E. 711." He then refers to the peculiar form of instruction which has been approved in Missouri, and to which we will hereafter revert. In *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592, the court, reviewing the action of the trial court in admitting evidence of escape pending trial, speaks of flight as one of the most common grounds for a presumption of guilt.

But in respect to all these references to evidence of flight as raising a presumption of guilt, it is to be observed that it is one thing to say, in giving a legal reason for the admissibility of evidence of flight, that guilt may be presumed therefrom, and quite another thing to tell the jury that a presumption of guilt arises from such evidence. To prevent such an instruction being misleading, it would be necessary to go into ¹²⁷ refined legal distinctions as to presumptions of fact, presumptions of law, and mixed presumptions of fact and law, which are intelligible, if at all, only to a mind trained in legal conceptions and the use of technical language.

The error involved in directing the jury that evidence of flight gives rise to a presumption of guilt is clearly pointed out in the cases on the subject. In *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69, such an instruction is condemned. In *Hickory v. United States*, 160 U. S. 408, 16 Sup. Ct. Rep. 327, 40 L. ed. 474, the subject is fully considered, and an instruction is condemned which is characterized as "tantamount to saying to the jury that flight created a legal presumption of guilt so strong and so conclusive that it was the duty of the jury to act on it as an axiomatic truth," and the court continues as follows: "In this charge, also, it is true, the charge thus given was apparently afterward qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt, with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have; that is, as creating a legal presumption so well settled as to amount, virtually, to a conclusive proof of guilt." In *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. Rep. 864, 40 L. ed. 1051, the court approves what was said in the case from which we have just quoted, and, with reference to a similar charge, says: "The criticism to be made on this charge is that it lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt. It certainly would not be contended, as a universal rule, that the fact that a person who chances to be present on the scene of a murder shortly thereafter left the city would, in the absence ¹²⁸ of other testimony, be sufficient in itself to justify his conviction of the murder."

The only cases which we have been able to find sanctioning instructions to the jury that flight is presumptive evidence of guilt are those in Missouri, as to which Judge Thompson says (2 Thompson on Trials, section 2543, *supra*): "Often in Missouri, where the English idea concerning presumptions in criminal cases generally prevails, the following form of instruction upon this subject is used—ending, it is perceived, in submitting the fact as a circumstance to the consideration of the jury: 'The court instructs the jury that flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having shot and killed Minnick, as charged in the indict-

ment, fled the country and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence.'” Such an instruction is sanctioned by the following among many cases in that state: *State v. Walker*, 98 Mo. 95, 9 S. W. 646; *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222; *State v. Hunt*, 141 Mo. 626-633, 43 S. W. 389. The rule in Missouri seems to be peculiar, and we are not inclined to follow it.

On principle and authority, the instruction as to the presumption to be drawn from proof of flight is erroneous, and should not be sustained, unless it is so far sanctioned in the cases in our own state that we are precluded from following the dictates of reason as illustrated by the weight of authority. In *State v. Rodman*, 62 Iowa, 456, 17 N. W. 663, and *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202, we approved instructions to the effect that evidence of flight, or attempt to escape, should be considered as tending to establish guilt. In *State v. Schaffer*, 70 Iowa, 371, 30 N. W. 639, and *State v. Stevens*, 67 Iowa, 557, 25 N. W. 777, we held that evidence of flight was properly introduced, and that the fact of flight was material. In *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661, an instruction was approved which told the jury ¹²⁹ that if they found from the evidence that defendant, upon being informed that he was suspected of or charged with crime, “fled to avoid arrest, and remained away, going under an assumed name, such fact is a circumstance which *prima facie* is indicative of guilt.” In *State v. James*, 45 Iowa, 412, a similar instruction is quoted, but without discussion of its correctness as a proposition of law, the only question considered being as to whether there was sufficient evidence of flight to warrant the submission of the question to the jury. In *State v. Arthur*, 23 Iowa, 430, an instruction is condemned which told the jury that a mere attempt to escape raised in law a strong presumption of guilt. In the last-cited case the court says: “That an unexplained attempt to escape is a circumstance against a party accused of crime is undoubtedly true, and as such it may be proven to and considered by the jury. But at most it only raises a presumption—a presumption ordinarily inconclusive rather than strong, and one which is variable in force, dependent upon the circumstances surrounding the prisoner. . . . The true course is to allow the fact of evading or attempting to evade justice to be proved to the jury as a circumstance which *prima facie* is indicative of guilt.” But these authorities are far from sufficient

to justify the instruction given in this case. To say that flight is a circumstance *prima facie* indicative of guilt is a very different thing than saying that "such fact would be presumptive evidence of guilt."

Although the term "presumptive evidence of guilt," as applied to a certain state of facts, may, perhaps, sometimes indicate no more than that the facts referred to may be considered by the jury as evidence from which guilt may be inferred as a matter of fact, and not as a matter of law, yet it is always unwise, in giving the jury instructions as to the evidence, to say that from any particular fact a presumption of guilt arises. The question of guilt is one to be determined by the jury on all the facts. In *State v. Brady*, 121 Iowa, ¹²⁰ 561, 97 N. W. 62, the court, referring to an instruction as to evidence of recent possession in a prosecution for burglary, says: "The law does not attach a 'presumption of guilt' to any given circumstances, nor does it require the accused to 'overcome the presumption thereby raised' in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense the words 'presumption' and 'prima facie evidence' must be understood when employed in this connection." It is evident that the presumption arising from the recent unexplained possession of stolen property, that the person thus found in possession is guilty of larceny or burglary, as the case may be, is entitled to greater weight than the presumption of guilt from flight.

The prejudicial and misleading character of the instruction given in this case is manifest when it is considered in connection with the evidence which we find in the record. So far as appears, the only evidence of flight was that one of the defendants, who was still in the neighborhood where the crime was committed, two days after the commission of the crime, said that he was charged with having killed and robbed a man, and that "they were after him for it," and he would get away if he could; that some time afterward—how long does not appear—he was in a town in an adjoining county, and that two months afterward all the defendants were under arrest for this crime in Missouri. Defendants were roving characters, going from place to place and getting work of a temporary nature, and there was

no reason disclosed why it should be expected that they would remain in the place where they were boarding, near the scene of the robbery, as they had no permanent employment at that place. Now, for the court to say that if it was proven that these ¹³¹ two defendants, soon after the commission of this crime, left the place where they had been staying as boarders, and two months afterward were found in Missouri, they might be convicted of the crime charged, without any further evidence whatever of their connection with the offense, was manifestly erroneous; and this is exactly what the jury were told. As a matter of fact, there was other evidence of their guilt, although the testimony of the witnesses was conflicting; but the jury would have been warranted under this instruction in finding them guilty on the evidence of flight alone, ambiguous as it was, although the jury did not believe that the other evidence even tended to connect them with the crime.

For error in giving the instruction above referred to, a new trial must be ordered.

Reversed.

Mr. Chief Justice Deemer Dissented and after quoting the instruction in question, said that: "The use of the word 'presumptive' is said to be fatal to the instruction. I do not think so. It is agreed that flight is evidence of guilt, but the majority say that it is not presumptive evidence. If it is not I should hardly know what qualifying term to use in order to express the thought. What does this adjective mean? The Century Dictionary says: 'Based on a probability; probable; grounded on probable evidence; proving circumstantially, not directly.' Is flight, then, evidence based upon presumption or probability? Does it tend circumstantially to prove guilt? The authorities cited by the majority answer these questions in the affirmative as I understand them. What is a presumption of fact in criminal jurisprudence? Wharton, in his work on Criminal Evidence, says: 'It is a logical argument from a fact to a fact. It is an argument which infers a fact otherwise doubtful, from a fact which is proved': Wharton on Criminal Evidence, 9th ed., sec. 707. Lawson says: 'It is an act of reasoning and much of human knowledge on all subjects is derived from that source': Lawson on Presumptive Evidence, 2d ed., 640. Bouvier says: 'It is an inference drawn by a process of probable reasoning, from some one or more matters of fact.' See, also, Best on Presumptions, sec. 12, and also State v. Mecom, 95 Iowa, 433, 64 N. W. 286. It is of course a disputable presumption, and one to be drawn generally by the jury. The question then is, Does an inference of guilt arise from evidence of flight under the facts assumed in the instructions? I think

that the authorities are practically agreed on the proposition: It will be noticed that the court does not indicate in any manner how strong that inference is; the instruction leaves the whole matter to the jury, simply saying that evidence of flight, if unexplained, may be considered by them as evidence of guilt. After all, the whole matter is left to the jury. If a jury is not justified in considering unexplained flight, under the circumstances pointed out in the instruction as evidence of guilt, then such evidence is inadmissible for any purpose. This is all the instruction warrants it in doing; and, if it does not announce the law, then I have read the books to no purpose. There is nothing in the instruction which, even inferentially, asserts that the jury might convict on evidence of flight alone. The court characterizes it as a certain kind of evidence, and then says that the jury may consider it as evidence of guilt, that is to say, as evidence tending to show guilt. Its characterization of the evidence as 'presumptive' rather than 'direct' has support in all the authorities. It is of the same character as possession of property recently stolen; or identity of names in identifying persons; or the presumption that one intends the natural and probable consequences of his acts, or that he intended to do that which he did; or the inference of guilt from the fabrication or falsification of testimony; or the presumption against suicide due to love of life; or the presumption of sanity—each and all are presumptions of more or less weight. . . . All the authorities, so far as I have been able to examine them, hold that flight, or the escape of an accused person after the commission of a crime, is a circumstance tending to show guilt—that is, is presumptive evidence of guilt—and that a jury may consider such conduct as evidence of guilt: See cases cited by the majority," and *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *Plummer v. Commonwealth*, 1 Bush, 76; *Porter v. State*, 2 Ind. 435; *State v. Arthur*, 23 Iowa, 430; *State v. James*, 45 Iowa, 412; *State v. Boyer*, 79 Iowa, 330, 44 N. W. 558; *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661; *People v. Pitcher*, 15 Mich. 397; *Fanning v. State*, 14 Mo. 386; *Dean v. Commonwealth*, 4 Gratt. 541.

"The rule in Alabama is well stated in *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592, wherein it is said: 'Flight, in a criminal prosecution, is one of the most common grounds for a presumption of guilt. . . . Flight is universally admitted as evidence of the guilt of the accused, although it is not conclusive.'

"The instruction has support in the following authorities, in addition to those already cited: *State v. Hunt*, 141 Mo. 633, 43 S. W. 389; *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Walker*, 98 Mo. 95, 9 S. W. 651, 11 S. W. 1133."

Flight of the Accused as evidence of his guilt is considered in *Lewis v. State*, 96 Ala. 6, 38 Am. St. Rep. 75, 11 South. 259; *State v. Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888, 35 Pac. 117; *State v. Foster*, 130 N. C. 666, 89 Am. St. Rep. 876, 41 S. E. 284. In *State v. Ma Fao*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222, it is held that a presumption of guilt arises where he flees to avoid arrest. Flight of the accused itself, however, is held not to authorize the jury to presume guilt in *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286, 32 S. E. 851.

AMERICAN TRADING AND STORAGE COMPANY v. GOTTSTEIN.

[123 Iowa, 267, 98 N. W. 770.]

JUDGMENTS—Foreign—Collateral Attack.—A judgment of a court of another state is conclusive against collateral attack as to whether the complaint was such as to warrant a personal judgment. (p. 320.)

JUDGMENTS—Pleadings in Equity.—Prayer for general relief in a complaint in equity will sustain a personal judgment. (p. 320.)

JUDGMENTS—Foreign.—A Demurrer to a petition alleging that a personal judgment was entered by the court of another state in conformity with the law thereof, is an admission for the purpose of deciding on the merits of the demurrer, that such judgment was warranted by the pleadings. (p. 321.)

JUDGMENTS—Deficiency—Personal Judgment.—A judgment determining the amount due, establishing a lien and decreeing a sale of property to pay the debt, and directing a holding of the surplus, until the further order of the court, is not a final, but an interlocutory, judgment, and, in case of deficiency, a personal judgment may be rendered therefor by subsequent decree. (p. 321.)

Berryhill & Henry, for the appellant.

C. E. Hunn, for the appellee.

208 **McCLAIN, J.** The objection raised by the demurrer to plaintiff's recovery on the Illinois judgment set out in the petition is that the Illinois court had no jurisdiction of the defendant, and therefore the judgment rendered is void. The claim of want of jurisdiction is predicated on two grounds: 1. That in its bill of complaint in the Illinois court the complainant (plaintiff in this action) did not ask relief by way of a personal judgment against defendant; and 2. That after rendering a final decree in the action which did not include any personal judgment against the defendant, the Illinois court proceeded without jurisdiction to render a subsequent decree, which is the

one relied on by plaintiff, in which it is adjudged that the complainant recover of the defendant the sum of five hundred and thirty-two dollars and ninety-three cents, for which execution shall issue as upon a judgment at common law. It is sufficiently shown by the allegations of the complaint that the defendant appeared in the Illinois court so as to confer upon that court jurisdiction to render a personal judgment, provided the court had the power in such proceeding and at the time the final decree was rendered to enter a personal judgment. In the complaint filed in the Illinois court relief is asked by way of foreclosure of a lien against certain personal property alleged to belong to the defendant for certain storage and handling charges in connection with such property shipped by defendant to complainant at Chicago for sale, with an additional prayer for "such other and further relief in the premises as equity may require and as to the court may seem meet." The objection that this complaint did not give the Illinois court jurisdiction to enter a personal judgment is not well taken, for several reasons. In the first place, the decree of the Illinois court having jurisdiction of the parties is conclusive as against collateral attack on the question of law as to whether the complaint was such as to warrant a personal judgment. There are, no doubt, expressions in text-books and opinions to the effect that a judgment for relief, not asked for in the complaint, is void ²⁶⁹ for want of jurisdiction, but, as far as any authorities to this effect are cited for appellee, they relate to cases where the question was raised by way of appeal or other method of direct attack, or where the judgment was by default, and therefore without jurisdiction, except in so far as the defendant was advised by the notice or summons and the complaint or other pleading filed that judgment might be rendered against him. It is not necessary now to discuss the authorities on this subject, as our conclusion is sufficiently supported by other considerations hereinafter stated.

It seems to be well settled under the authorities that a prayer for general relief in a complaint in equity will sustain a personal judgment: *Iler v. Griswold*, 83 Iowa, 442, 49 N. W. 1023; *Thomas v. Farley Mfg. Co.*, 76 Iowa, 735, 39 N. W. 874. Thus, in *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937, it is held that a bill for the specific enforcement of a contract, which also contains a prayer for general relief, will support a money decree, although the specific relief asked cannot be given. And to the same effect are *Gibbs v. Davies*, 168 Ill. 205, 48 N. E.

120, and *Penn v. Folger*, 182 Ill. 76, 55 N. E. 192. We think there can be no doubt of the power of the Illinois court, as a general principle of equity practice, to enter, as it did, personal judgment for the balance of the indebtedness of defendant to the complainant after the application in discharge of complainant's lien of the amount realized by judicial sale of the property subject to the lien.

But, if there could be any doubt of the sufficiency of the complaint to sustain the decree for a money judgment under the general rules of procedure recognized in this state, it is removed, so far as this case is concerned, by plaintiff's allegation in an amendment to his petition that by the general usage and practice of courts of equity in the state of Illinois and the decisions of the supreme court of said state a court of chancery of that state has jurisdiction under such prayer for general relief to enter personal judgment when the same is consistent with the allegations ²⁷⁰ of fact contained in the bill, and that the decree of the Illinois court was rendered in accordance with such usage and practice. This allegation of fact as to the law of Illinois is confessed by the demurrer, and we are bound, therefore, to assume, for the purpose of this case, as it is now before us, that the personal judgment was sufficiently warranted by the allegations of the bill of complaint.

Appellee's contention that the Illinois court had lost jurisdiction of the case before the rendition of the decree relied on by the plaintiff is predicated on the claim that it had previously rendered a final decree, which did not include a personal judgment against the defendant; but this contention is without merit. In the first decree it was found that defendant was indebted to plaintiff in the sum of six hundred dollars, for which complainant had a lien upon the personal property referred to, and the master in chancery, whose report of the amount of indebtedness was therein confirmed, was ordered on default of payment within a time fixed to sell said property, and out of the proceeds thereof satisfy complainant's lien and the costs of the proceedings so far as sufficient for that purpose, and hold the remainder, if any, subject to the further order of the court. Afterward, by the decree on which plaintiff relies, the court approved the report of sale and distribution of proceeds by the master, and, finding that after applying the amount realized from the sale to the satisfaction of complainant's lien and the costs a balance of five hundred and thirty-two dollars and ninety-three cents was left unpaid, rendered a personal judg-

ment, as already stated, in favor of the complainant and against the defendant for that amount. Now, it is clear that by the terms of the first decree some further proceedings in the court were contemplated and required. Such decree was not a final decree, but was interlocutory in nature, and after the master had made the sale, and reported his action in the premises, it was proper for the court, and within its jurisdiction, to render a final decree as to the disposition of any proceeds of the sale remaining after the satisfaction of the ²⁷¹ lien and costs, or, if any balance of the lien and costs remained unsatisfied, then for personal judgment against the defendant for such balance.

Plaintiff's petition as amended was not, therefore, subject to the objections taken to it by the defendant's demurrer, and the demurrer should have been overruled. The judgment of the trial court predicated on the sustaining of defendant's demurrer was erroneous, and it is reversed.

Courts should Render such Judgment, as a rule, as, upon the whole record, the law requires, without regard to any request or want of request therefor: *Johnson v. White Mountain Creamery Assn.*, 68 N. H. 437, 73 Am. St. Rep. 610, 36 Atl. 13. And they should award any relief to which the plaintiff's pleading and proof entitle him, regardless of the prayer embodied in his complaint: *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265. Under a prayer for general relief, a personal or deficiency judgment, it seems, may be rendered against a mortgagor: *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. Rep. 438, 33 L. ed. 706; *Nolen v. Woods*, 80 Tenn. (12 Lea) 615. As to the effect of a default judgment granting relief not prayed for, see *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698, 90 N. W. 1042, 58 L. R. A. 811; *Russell v. Shurtleff*, 28 Colo. 414, 89 Am. St. Rep. 216, 65 Pac. 27; *Foley v. Foley*, 120 Cal. 83, 65 Am. St. Rep. 147, 52 Pac. 122.

McCLURG v. BRENTON.

[123 Iowa, 368, 98 N. W. 881.]

UNLAWFUL SEARCH—Consent—Evidence.—If, in an action to recover for searching premises without a warrant, the evidence as to whether the plaintiff and owner gave his consent to the search is conflicting, directing a verdict for defendant is erroneous. (p. 325.)

UNLAWFUL SEARCH by Officer.—A search of a private residence for evidence of crime, without a warrant therefor, cannot be justified, though made by an officer. (p. 325.)

UNLAWFUL SEARCH—Evidence—Use of Hounds.—In an action to recover for an unlawful search, evidence as to the conduct of hounds used to track the thief is admissible only on the question of malice, in mitigation of damages. (p. 327.)

UNLAWFUL SEARCH—Use of Hounds—Evidence.—In an action to recover for an unlawful search of private premises, through the use of hounds, evidence as to their breeding and training, letters indorsing, and stories concerning their ability and usefulness, are not admissible. (pp. 327, 328.)

UNLAWFUL SEARCH—Evidence—Photographs of Hounds.—In an action to recover for an unlawful search, photographs of hounds used in making such search are not admissible in evidence. (p. 328.)

McVey, McVey & Graham and J. D. Laws, for the appellant.

Read & Read and Myerly & Myerly, for the appellees.

323 **WEAVER, J.** That the appellees did search the house and premises of the plaintiff for the discovery of alleged stolen property, and that such search was made without any warrant issued for that purpose, was not denied on the trial below, and is conceded in argument. The claim is made, however, that this act, otherwise unlawful, was done with the consent of the plaintiff, and it was upon the theory that this defense had been established without substantial dispute that the trial court directed a verdict against the appellant. We have therefore to consider whether the evidence made a case from which the jury might properly have found in appellant's favor. At the date of the transaction in question, the defendant Brenton was mayor of the city of Des Moines, Brackett was chief of police, and Crewse was captain of the night force of said city. Plaintiff was the head of a family, residing in Des Moines, near the boundary line between that city and the town of Valley Junction. The evidence, giving it the most favorable construction which it will reasonably bear in plaintiff's favor, as we are required to do for the purposes of this appeal, tends to show the

following state of facts: On or about May 2, 1902, "a Mr. Brown" informed the mayor that a neighbor, from whom some chickens had been stolen, desired the officers to bring out certain bloodhounds kept in the city, and try to trace the thief. Responding to this call in person, the mayor on the same evening started for the scene of action, accompanied by quite a retinue of followers. Among the number were the chief of police, the captain of the night force, a city alderman, the city physician, the "man with the hounds," and various other gentlemen, presumably volunteers in the cause of retributive justice. The order and line of march are not made clear by the testimony, and we have not been favored with any maps or charts showing the disposition of the forces. It does appear that some time during the evening they rendezvoused at Valley Junction, from which base of operations the advance upon plaintiff's house was made ³⁷⁰ about 10 or 11 o'clock P. M. The dogs were taken to the premises of the person who claimed to have lost the chickens, and there turned loose for a trial of their detective skill. Following their lead, as is claimed, the mayor's forces came to the house of the plaintiff, who, unsuspecting of this canine impeachment of his good name and fame, had retired with his family for the night. The mayor and captain of the night force advanced to the door, gave the alarm in due form, and demanded entrance. Soon the door opened "about five or six inches," it is said, revealing the plaintiff clad in a nightrobe, and armed with an iron poker. The captain, turning his head aside to avoid an anticipated blow from the poker, at the same time deftly inserted his foot between the door and the jamb, thereby retaining all the advantage thus far gained. The mayor, noting the captain's peril, interposed to prevent any assault upon him by promptly warning the plaintiff: "None of that goes here. I am mayor of the city of Des Moines, and we are here on official business." Naturally this proclamation tended to chill the ardor of the defense, and the door was soon opened—whether by the act of the plaintiff from within, or by pressure from the party without, is a matter of controversy.

The defendants testify that, on being informed of the official character of the mayor's party and the object of their call, plaintiff allowed them to proceed and make the search; and, if this was not disputed, the ruling of the lower court could, perhaps, be sustained, although it is not free from doubt that a consent obtained in the manner, and under the circumstances portrayed by the defendants themselves, would be, in any just

sense of the word, a free and voluntary act. But the evidence as to the alleged consent is by no means all one way. Plaintiff and his two sons distinctly deny that consent was given to the entry into the house or to its search, and declare that the door was forced open against the resistance of the plaintiff, that the poker was forcibly wrested from plaintiff's hands, and that, when one of the sons attempted to hand the key of the chicken-house to his father, one of the ³⁷¹ mayor's party unceremoniously took possession of it, and thereby gained entrance to the chicken-house. In some material respects their story finds corroboration in the testimony of the witnesses for the defense. There is testimony, also, that the search was conducted, by some of the party at least, in a loud and boisterous manner, and with little regard for the sensibilities of the plaintiff and his family. One of the searchers candidly admits that he was a "little enthused," and did not pay much attention to the details; and it is said by one witness that another member of the party became somewhat confused as to the real object of the search, and demanded to know whether there was "any beer in the cellar." The discouraging answer that there "was no cellar" seems not to have been fully credited, for it is further testified that the knot holes in the floor were carefully probed with a pocket rule, to ascertain the amount of available space thereunder. Upon such a state of the record, we think it very clear that the jury should have been allowed to pass upon the issue of fact presented by the pleadings. If plaintiff's home was invaded in the manner claimed by him, he has suffered a wrong for which the law will afford him substantial remedy. On the other hand, if he freely and voluntarily surrendered his premises to the search, as claimed by the defendants, he has suffered no wrong; but, the fact being in dispute the court cannot rightfully intervene to direct a verdict for either party. The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every court in the English-speaking world, from Magna Charta down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own republic.

The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without ³⁷² a legal warrant procured for

that purpose. No amount of incriminating evidence, whatever its source, will supply the place of such warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open. Even with a warrant, the law of this state forbids a search in the night-time, save upon a showing therefor, and upon special authority expressed in the writ: Code, sec. 5555. A right thus carefully guarded by the statute as well as by the common law is not to be lightly disregarded.

2. Plaintiff assigns error upon the ruling of the trial court admitting testimony offered by defendants as to the conduct of the dogs in leading the searching party to his house. Its admission is sought to be justified by defendants as being a part of the *res gestae*, and upon the question of malice. As a part of the circumstances leading immediately to the search and thus, perhaps, tending to disclose something of the motive actuating the defendants, we are inclined to hold, though not without some hesitation, that it was allowable for the defendants to prove the facts as to the presence of the dogs and the use made of them on the occasion under investigation. Beyond that, however, the defendants should not have been permitted to go. It must be borne in mind that this is not an action for malicious prosecution or malicious arrest, but for an alleged wrongful and unauthorized trespass upon plaintiff's home and property. In a case of the former kind, an honest belief in the guilt of the person prosecuted or arrested, and the facts and circumstances on which such belief is founded, are ordinarily proper matters of inquiry; and such circumstances, if amounting to probable cause for the proceeding complained of, will constitute a complete defense to a suit for damages. But in a case like the one at bar the doctrine or rule of probable cause has no application. To illustrate: in an action for damages from malicious prosecution for theft the defendant may plead and prove that plaintiff was in fact guilty of the crime charged against him, and thus establish a perfect defense. ³⁷³ But in an action for an unlawful search it is no defense whatever to say that plaintiff was a thief, or did in fact have the stolen property upon his premises. The fact may be admitted, but the right of action remains. There is but one possible phase of the case upon which the admission of any testimony of this kind can be upheld. If the jury should find for plaintiff—that the wrongful search was made, and that in such act the defendants were moved or inspired by malice toward the plaintiff—they

could, in addition to actual damages, assess a greater or less sum against the defendants by way of punishment or as exemplary damages. In mitigation of such damages, only, evidence may be received of any fact which fairly and reasonably tends to show that the act was done in good faith and without malice. Motive and intent being of the essence of the inquiry where exemplary damages are sought, any evidence which fairly tends to their disclosure is admissible: *Redfield v. Redfield*, 75 Iowa, 435, 39 N. W. 688; *Wallace v. Finch*, 24 Mich. 255; *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748; *Voltz v. Blackmar*, 64 N. Y. 440. It is necessary, however, for the court to carefully guard the application of this rule, to prevent its being made an open door for the introduction in evidence of much that is immaterial, irrelevant, and confusing; and the jury should be informed in cases of this nature that evidence of good motive or absence of malice goes only to the matter of assessing damages by way of punishment or example, and should be wholly disregarded in assessing actual or compensatory damages.

3. Much evidence was admitted over plaintiff's objection which was merely laudatory of the fame and royal lineage of the hounds employed in the raid upon the plaintiff's premises. For instance, the mayor, as a witness, was permitted to state what he had been informed as to the breeding and training of the animals, and what he had heard of their work, and that an old schoolmate of the witness had highly indorsed them in a letter. In view of the well-known ease with which letters of indorsement from good men are procured by all kinds of ³⁷⁴ candidates for favor it may, perhaps, be presumed that credentials of this sort could have no weight with the jury, and that plaintiff suffered no prejudice therefrom; but we think the matter so clearly incompetent and immaterial that the objection thereto should have been sustained. The witness Quint was also allowed to testify that he represents a company which insures banks against burglary, and makes it a business to "punish and prosecute criminals," and that in such capacity he had looked up the history of the hounds, with a view to utilizing their services in the company's business. From this investigation he says he was "led to believe them finely bred, safe, and sure, trained for great capacity in following and tracking and using the scent, quite intelligent, and probably the best hounds in the west"; a statement which he emphasized by stories gleaned from hearsay—how by the remarkable instinct of these dogs a robbery of a bank had been frustrated

and the murderer of a woman had been driven to suicide after a chase of thirty miles, the only clue given the dogs being a scent "from a pair of socks" of the fleeing male factor.

As a seal to this eulogium, the witness produced photographs of the hounds, which were admitted in evidence. The particular point in controversy which these portraits were intended to illuminate is not pointed out by counsel, and our unaided efforts in that direction have proved fruitless. All this testimony both of the mayor and Quint was objected to by the plaintiff, and should have been excluded. The matter being tried was the alleged trespass upon plaintiff's home, not plaintiff's guilt or innocence of chicken stealing, nor the pedigree, training, skill, or appearance of the bloodhounds—a distinction which at times seems to have been overlooked in the presentation of the testimony.

4. Complaint is also made of the action of the trial court in allowing defendants to amend their answer upon the eve of trial; but to permit amendment is a rule applied by ³⁷⁵ courts with great liberality, and we find nothing to indicate that the discretion thus universally exercised was abused in the present instance. Other questions raised are such as are not likely to arise upon a retrial, and we do not consider them.

For the reasons stated, the judgment appealed from is reversed.

SEARCH OF PREMISES OF PRIVATE PERSONS.

- I. Security from Unlawful Search, 328.
- II. Search Under Warrant.
 - a. Generally, 329.
 - b. Requisites of Warrant.
 - 1. Designation of Place, 331.
 - 2. Description of Property, 332.
- III. Liability Under Search-warrants.
 - a. Malicious Prosecution, 332.
 - b. Liability in Trespass, 333.
- IV. Warrant of Arrest as Search-warrant, 334.

I. Security from Unlawful Search.

An unreasonable search is an examination or inspection without authority of law, of one's premises or person, with a view to the discovery of stolen, contraband or illicit property, or for some evidence of guilt, to be used in the prosecution of a criminal action. The right of individuals to be exempt from such searches is guaranteed by an amendment to article 4 of the constitution of the United States, and such amendment is incorporated generally in the constitutions of the several states. Such amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized": U. S. Const., amendment to article 4. But the right to be secure in one's own house is not a right derived from the constitution alone. It existed long before the adoption of the constitution at the common law: *United States v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,893.

The violation of the right to be secure in one's home does not require actual entry upon the premises and a search for and the seizure of property in order to constitute it an unreasonable search and seizure. The compulsory production of one's private books and papers to be used against him in a criminal or penal proceeding, is within the meaning and spirit of such constitutional provision: *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746. Searches made upon the complaint or suggestion of one party of the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, are unreasonable and unwarranted; as, for instance, a search made on a warrant issued by a judge in insolvency, on the complaint of an assignee for property belonging to the debtor: *Robinson v. Richardson*, 13 Gray, 454.

The amendment to the United States constitution above referred to, declaring that the right of the people to be secure in their property against unreasonable searches does not apply to state governments, but is a limitation exclusively upon national power. It has no application to proceeding under authority of the state. But nevertheless the same right is generally guaranteed by the state constitutions: *Reed v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; *State v. Brennan*, 2 S. Dak. 384, 50 N. W. 625.

II. Search Under Warrant.

a. Generally.—In no case, it is believed, has any person, even a peace officer, the right to enter and search the private premises of another for evidence of crime or of a violation of penal laws except under authority of a search-warrant: *Reed v. Adams*, 2 Allen, 413. Perhaps, after a person is alleged to have committed a crime his premises may be searched for evidence thereof, without a warrant by permission and with the assistance of the servant or agent of the owner, when the former is in charge of the premises: *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. E. A. 227; *Grim v. Robinson*, 31 Neb. 540, 48 N. W. 388. A peace officer vested with authority to "inspect" certain enumerated places cannot without a warrant, in-

vade or search such a house or place on his mere suspicion that misdemeanors are committed therein. The power to "inspect" does not confer authority of visitation and search: *People v. Glennon*, 37 Misc. Rep. (N. Y.) 1, 74 N. Y. Supp. 794. After pointing out that policemen have no right to invade and search private houses without a warrant and on mere suspicion or hearsay that some sort of crime may have been committed therein, or that such house contains some evidence that a crime has been committed. Judge Gaynor said: "If it were so that we are all open to have our houses invaded, ransacked and searched by policemen on nothing except what they may choose to call their suspicions, and that we may be arrested in the same way, we would not be living under a free government, but under a most intolerable despotism, the like of which former generations struggled against until they obtained those guaranties of individual rights and liberties which made them free, the chief of which were that their houses should not be invaded and searched, and that they should not be seized except by warrant and process of law": *People v. Glennon*, 37 Misc. Rep. (N. Y.) 7, 74 N. Y. Supp. 794. The means generally invoked, and the only legal means that can be invoked, to search the premises of a private individual, is a search-warrant, which is an authority in writing from the state signed by a magistrate, and directed to an officer, commanding him to examine a designated place for articles alleged to be concealed there contrary to law. Such a warrant may be issued to search for property stolen or embezzled, or which has been used as the means of committing a felony, or which some person has in his possession with intent to use as a means of committing a crime: *People v. Noelke*, 29 Hun, 461; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746. "Search-warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right, but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted, and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because, without them, felons and other malefactors would escape detection": *Robinson v. Richardson*, 13 Gray, 456. The most frequent use of the search-warrant is to search for goods alleged to have been stolen and to such use it seems formerly to have been confined: *Stone v. Dana*, 5 Met. (Mass.) 98; *Entick v. Carrington*, 19 How. St. Tr. 1029; *State v. Mann*, 5 Ired. 45.

Statutes in many of the states authorize the use of the search-warrant to search for and seize lottery tickets and materials: *Commonwealth v. Dana*, 2 Met. (Mass.) 329; and gaming implements:

Commonwealth v. Gaming Implements, 119 Mass. 332; Hastings v. Haug, 85 Mich. 87, 48 N. W. 294; or for the seizure of intoxicating liquors kept for sale in violation of law: Commonwealth v. Intoxicating Liquors, 6 Allen, 599; Guenther v. Day, 6 Gray, 490; Downing v. Porter, 8 Gray, 539; Commonwealth v. Intoxicating Liquors, 105 Mass. 178; Hussey v. Davis, 58 N. H. 317; State v. Newman, 96 Wis. 258, 71 N. W. 438.

b. Requisites of Warrant.

1. Designation of Place.—If a search-warrant is issued upon probable cause supported by affidavit, and particularly describes the place to be searched and the property to be seized, it is sufficient: Langdon v. People, 133 Ill. 382, 24 N. E. 874; but a search-warrant, to be of any validity and to authorize a search, must describe the place to be searched, the person against whom the warrant issues, and the property sought with such certainty as to identify them: Reed v. Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122; Byrnside v. Burdett, 15 W. Va. 702; Ashley v. Peterson, 25 Wis. 621. Thus, a search-warrant based on an affidavit that on a specified date a certain amount of cottonseed was taken from the affiant's premises and that there is probable cause for believing such property to be on a certain plantation, occupied by two designated persons, is void for want of a certain description of the place to be searched: Thrash v. Bennett, 57 Ala. 156. It has been held, although we do not think it to be the prevailing rule, that the description in the warrant of the place to be searched should be as certain and specific as would be necessary in a deed of conveyance: Jones v. Fletcher, 41 Me. 254; State v. Bartlett, 47 Me. 388; but the place to be searched must be particularly designated in the search-warrant, and a warrant authorizing a search of any suspected place is too general to be of any validity: Frisbie v. Butler, Kirby (Conn.), 213; People v. Holcomb, 3 Park. Cr. Rep. 656. The warrant must specifically describe the goods, place, and person, and direct the officer to search such place and arrest such person, and if any of these preliminaries is omitted, or if the warrant is too general, the proceedings are coram non judice: Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151. A search-warrant commanding the officer to diligently search a certain house for stolen goods will not authorize him to force his way into an adjoining house and search it: Larthet v. Forgay, 2 La. Ann. 524, 46 Am. Dec. 554; and a warrant to search the dwelling-houses of a certain person only authorizes the officer to search the house in which such person lives, and if he searches a house hired and occupied by another, although owned by such person, he is guilty of a trespass: Humes v. Taber, 1 R. I. 464.

A house or place where the contraband goods are believed to be concealed is sufficiently designated and described in the warrant by denominating it as the office of the person named in the warrant, and specifically designating the street and number of its location,

although the person named and another occupy such office together: *Commonwealth v. Dana*, 2 Met. (Mass.) 329. And a warrant to search the house of a particular person and the barn, outhouses, and grain stacks of such person, on the same farm, is sufficiently specific, and not void for uncertainty: *Meek v. Pierce*, 19 Wis. 318.

Authority to search a house will justify the search of a shop on the same premises if the goods under search are such as might reasonably be found in such shop: *Dwinnels v. Boyington*, 3 Allen, 310. A warrant directing the officer to search the house of a certain named person authorizes the search of his dwelling-house situated on the premises designated in the warrant: *Wright v. Dressel*, 140 Mass. 147, 3 N. E. 6.

2. **Description of Property.**—The property to be seized under a search-warrant must be particularly described therein and no other property can be taken thereunder. The goods to be seized must be described with such certainty as to identify them: *Reed v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122; *State v. Slamm*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097. Thus, a description as "goods, wares and merchandise," without any specification of their character, quality, number, or weight, or any other circumstances tending to distinguish them, is not sufficiently particular or definite: *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151. If the warrant and the complaint on which it is issued are on the same paper, and the goods to be searched for are properly designated and described in the complaint, and the warrant directs the officer to search for the property, "mentioned in the above complaint," the process is legal and sufficient, without further designation or description in the warrant: *Commonwealth v. Dana*, 2 Met. (Mass.) 329. A description in the warrant of the property to be seized as "three cases of misses' and women's boots, of the value of one hundred dollars, a lot of oak-tanned soles, of the value of fifty dollars, and ten sides of sole leather, of the value of forty dollars," is sufficient: *Dwinnels v. Boynton*, 3 Allen, 310; or such description as "goods and chattels, to wit, gaming implements and other chattels and apparatus, which complainant is unable to specify, used, and kept to be used in unlawful gaming," is sufficient as a description of the property to be taken: *Hastings v. Haug*, 85 Mich. 87, 48 N. W. 294.

III. Liability Under Search-warrants.

a. **Malicious Prosecution.**—One who maliciously and without probable cause institutes and carries forward proceedings under a search-warrant is liable to an action for malicious prosecution: *Carey v. Sheets*, 67 Ind. 375; *Whitson v. May*, 71 Ind. 269. And a mere application for a search-warrant, on the ground that the goods have been stolen, and are concealed within a person's inclosure, if made with malice and without probable cause, is sufficient ground to sus-

tain an action for malicious prosecution against the person making such application: *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693. In such an action the plaintiff shows a prima facie case by proof that upon the search the property was not found, that the return of the warrant so showed, and that for a long time he had borne a good reputation in the neighborhood for integrity and honesty: *Olson v. Trete*, 46 Minn. 225, 48 N. W. 914. Or if the complaint alleges, and the evidence shows that defendant has falsely accused plaintiff of theft, and maliciously and without probable cause procured a warrant to search his premises and has caused it to be executed in such manner as to cause gross humiliation, a trespass is sufficiently shown for which the defendant is liable, and it makes no difference whether the action is considered as one for slander, false imprisonment or malicious prosecution: *Doane v. Anderson*, 60 Hun, 586, 15 N. Y. Supp. 459.

b. **Liability in Trespass.**—The form of action usually and properly employed to recover damages for a wrongful search under a warrant is trespass: *Anonymous*, Minor, 52, 12 Am. Dec. 31; *Reed v. Legg*, 2 Harr. 173; *Doane v. Anderson*, 60 Hun, 586, 15 N. Y. Supp. 459. If the search-warrant is in any way insufficient, it affords no protection to those charged with committing trespass in its execution: *Reed v. Lucas*, 42 Tex. 529. But it seems that trespass will not lie against a person who has procured a search-warrant to search for stolen goods, if such warrant was duly and regularly issued and executed. But in such an instance an action on the case will lie, if the party procuring the warrant was actuated by malicious motives: *Beaty v. Perkins*, 6 Wend. 382. It has been held that if no goods are found under the search, the person taking out the warrant is a trespasser and liable as such: *Reed v. Legg*, 2 Harr. 173; *Simpson v. McCaffrey*, 13 Ohio, 508. It has also been decided that a search warrant is a sufficient justification, though the stolen goods are not found, even to the party at whose instance the writ issued, for an entry upon the suspected place, if the doors are found open and the entry is peaceable. But whether it would be a justification if the doors are found closed and are broken down is not decided: *Chipman v. Bates*, 15 Vt. 51, 40 Am. Dec. 663. If the defendant in trespass entered the dwelling-house of the plaintiff by virtue of a search-warrant, to find stolen goods, and, after the search had been concluded and the goods found and taken, the defendant, on some other pretext, again entered the house or aided others in doing so, for the purpose of finding other evidence against the plaintiff, to aid in convicting him of the theft of the goods, the defendant is guilty of trespass in effecting the second entry into such dwelling: *Lawton v. Cardell*, 22 Vt. 524.

Injury to the plaintiff's reputation and feelings may be alleged, proved, and recovered for in an action of trespass *vi et armis*, for

unlawfully entering his house under the pretense of searching for stolen goods: *Anonymous*, Minor, 52, 12 Am. Dec. 31; *Larshet v. Forgay*, 2 La. Ann. 524, 46 Am. Dec. 554. Circumstances of reasonable suspicion that stolen goods were upon the premises may be proved in mitigation of damages in trespass for a wrongful search under a warrant: *Simpson v. McCaffrey*, 13, Ohio, 508.

IV. Warrant of Arrest as Search-warrant.

A warrant of arrest may sometimes answer the purpose of a search-warrant, as a warrant for an arrest for a felony authorizes the officer in entering the shop or office of the person accused and there seizing the chattel alleged to have been stolen: *Banks v. Farwell*, 21 Pick. 156. Thus, under a warrant for the arrest of a lottery ticket dealer, the officer is authorized to search the room where such dealer is found, and seize a package of lottery tickets there found which belong to such dealer: *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

STATE v. RAPHAEL.

[123 Iowa, 452, 99 N. W. 151.]

BURGLARY.—Possession of Recently Stolen Goods, in the absence of a satisfactory explanation of the source of such possession, justifies a finding that the possessor broke and entered the building from which they were stolen. (p. 336.)

CRIMINAL LAW.—Possession of Recently Stolen Goods.—**Explanation.**—If the attendant circumstances are such as to satisfy the jury of the falsity of the explanation of the possession of recently stolen goods, and of the guilt of the possessor, his conviction is justified. (p. 336.)

CRIMINAL LAW.—Possession of Recently Stolen Goods.—**Burden of Proof** is on one in possession of recently stolen goods, to satisfactorily explain his possession. (p. 336.)

L. M. Whitney and J. T. Sullivan, for the appellants.

C. M. Mullan, attorney general, and L. De Graff, assistant attorney general, for the state.

⁴⁵² **SHERWIN, J.** At some time between the twenty-first and twenty-eighth days of February, 1903, the dwelling-house of Mrs. C. W. ⁴⁵³ Bown, in the city of Waterloo, Iowa, was broken and entered, and a large amount of silverware and other property was taken therefrom. The defendants at that time lived with their parents in Waterloo, occupying a room or rooms in the second story of the house, near an attic room, in which

they kept their clothing and other effects. Very soon after the burglary was discovered, this house was searched, and in this attic room the officers found a portion of the silverware and other property which had been stolen from the Bown house. This was wrapped in a cloth, and was taken possession of by the officers. Other articles of silverware were found there at this time, but, not being then identified, they were not taken. Three or four days after another search of the premises was made, and a coat and vest belonging to one of Mrs. Bown's sons, which had been stolen at the time of the burglary, were found in this same attic room. Between the two searches, property which was found in the room upon the first, but not taken by the officers, and which was afterward proven to have been stolen from the Bown residence, had been taken away, and was not again located. The defendant Joseph Raphael admitted upon the trial that the silverware and other property found in the attic and taken by the officers upon the first search had been put there by him, but claimed that it had been taken to the house and delivered to him for safekeeping by a young friend from Nebraska, who had stayed with the family a few days, and left shortly before the search was made, and whose whereabouts he did not then know. When the coat and vest were found and taken by the officers upon the second search, the mother of the defendants told the officers that they belonged to her son, the defendant Charles Raphael. He was not then under arrest, and upon his return home, soon after the search had been made, his mother told him of it, and of the taking of the coat and vest by the officers. He testified that, upon looking for his coat and vest, he found them gone, and that he immediately thereafter went to the sheriff's office, "looked at the coat," and thought it his. He did in fact make a thorough ⁴⁵⁴ examination of the garments in the sheriff's office, and even after he had been told that young Knox claimed them, he insisted that they belonged to him; that he had bought them in Nebraska three or four years before, brought them to Waterloo, and had them in his possession up to the time they were taken from his home; and that he could identify them at any place; and this claim he did not abandon until one of the pockets of the coat was turned inside out, and the name "Knox" found thereon.

The appellant Joseph Raphael insists that, because of his explanation of his possession of the silverware found in the attic and taken therefrom upon the first search, the case, as to him, should not have gone to the jury, and that the court erred in

not directing a verdict for him. But with this contention we cannot agree. This property was found in his possession but a few days after it was stolen, and, in the absence of a satisfactory explanation of the possession, the jury would be justified in finding that he broke and entered the building from which it was stolen: *State v. Jennings*, 79 Iowa, 513, 44 N. W. 799; *State v. Williams*, 120 Iowa, 36, 94 N. W. 255; *State v. Brady*, 121 Iowa, 561, 97 N. W. 62. It is true that the convenient other person from whom stolen property is so often received was present in this case in the defendant's explanation, but the jury would not be bound to believe the explanation, though it might not be contradicted by other direct evidence; and, if the attendant circumstances were such as to satisfy it of the falsity of the explanation, and of the guilt of the defendant, a conviction would be justified: *State v. Brown*, 25 Iowa, 566.

The fact that some of the other property stolen at the same time, and found in the attic upon the first search, but not then identified and taken by the sheriff was removed and secreted before the second search, and after the defendant's friend had left, was alone a strong circumstance tending to prove the falsity of the explanation.

The defendant, Charles Raphael, contends that there was no evidence tending to prove his possession of the coat and vest, and that the court should not have submitted his case to the jury or instructed on that question. We think otherwise. It may be conceded that the coat and vest were not found in his immediate possession, but the fact that he looked for them when informed by his mother that they had been taken from the attic by the sheriff, and, when not found there, immediately went to the sheriff's office, and, after a full examination of the garments, claimed and insisted that they were his, and that he had owned them for a long time, was evidence sufficient to warrant the jury in finding that they were in fact in his possession when they were found in the attic; and, if in his possession at that time, it devolved upon him to explain such possession. This he attempted to do by the statement that Patrick, the friend whom Joseph Raphael testified had taken the silver to the house, must also have left his coat and vest, and taken his in place thereof. There is no evidence in the record tending even to show that Patrick had a coat and vest similar to these, or that he took them to the house of the defendants, and we think the jury warranted in disregarding the attempted explanation of Charles Raphael.

We think the evidence as to both defendants warranted the instructions given by the court on the question of the recent possession of the silverware and the clothing, and warranted also the verdict of guilty. The judgment is therefore affirmed.

The Possession of Stolen Property as evidence of guilt is the subject of a monographic note to State v. Drew, 179 Mo. 315, post, p. 474.

**CRAWFORD v. MEIS. CRAWFORD v. LUTHMERS.
CRAWFORD v. BARTMAN.**

[123 Iowa, 610, 99 N. W. 186.]

REMAINDERMEN—Purchase of Tax Title.—Remaindermen who have no possession, or right of possession, at the time of a tax sale of the property, may purchase an outstanding tax title for their exclusive benefit as against other remaindermen. (p. 339.)

LIFE TENANTS.—Purchase of Tax Title by a life tenant does not vest the fee in him as against a remainderman, and the transaction amounts simply as a redemption from the tax sale. (p. 340.)

REMAINDERMEN—Ouster of—Adverse Possession.—If life tenants and part of the remaindermen join in a warranty deed, and the grantee enters into possession thereunder and continues such possession for the statutory period of limitation, paying taxes and making improvements, without knowledge of any defect in the title, which defect is known to the remaindermen not joining in the conveyance, this amounts to an ouster of the latter which ripens into a title by adverse possession. (p. 343.)

Hurd, Lenehan & Kiesel, for the appellants.

Longueville & Kintzinger, J. B. and A. M. Utt and Lyon & Lyon, for the appellees.

612 **BISHOP, J.** At the outset the rights of the parties undeniably were as follows: The said Theophilus Crawford, 613 Jr., and Eliza, his wife, "and the survivor of them," were entitled to the possession, use and income of the property during life. Upon their death their children named would become entitled to the estate as tenants in common, for a gift by a testator with remainder over creates a tenancy in common in the remaindermen after the termination of the life estate. Now, upon the happening of the death of Alexander, one of the remaindermen, his parents, the life tenants, without doubt inherited his one-sixth interest. With this accepted as the situation, we may pass on to the time when the lands were sold for

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taxes and the tax deed issued to David Crawford. Note may be taken at this point of the contention on the part of appellants to the effect that in the matter of taking title to the estate under such tax deed David Crawford acted solely as a trustee for and on behalf of the life tenants and the several remaindermen, and that the subsequent conveyances by him made were intended to be in execution of his trust, and not otherwise. Accordingly, it is insisted that the effect of such conveyance was simply to restore all parties to their former status, the three remaindermen to whom conveyance was made taking title in trust for themselves and their coremainderman. Without setting forth the evidence at length or entering upon an extended discussion thereof, we may dispose of this contention by saying that the evidence in the record which we regard as competent does not satisfy us that the relation of trustee and cestui que trust existed as contended for. We may proceed, therefore, upon the theory that David Crawford was a stranger to the life estate as well as to the estate in remainder, and that by his tax deed he acquired a perfect title to the property as against both the life tenants and the tenants in remainder. Taking this to be the situation, we may at once inquire what were the rights of the parties under the several deeds as executed and delivered by David Crawford.

First, as to the deed from David Crawford to George W. Franklin, and Helen A. Crawford. We think it clear ⁶¹⁴ that such deed had the effect to vest a perfect title in the grantees named therein. It is true, as contended for by counsel for appellants, that where there exists, as between joint tenants or tenants in common, a reciprocal duty of protecting the joint estate, one may not absorb or get rid of the interest of his cotenant by allowing the property to go to tax sale, and thereunder acquire title to the entire estate through the medium of a tax deed. And this is true whether the tax deed is procured to be executed directly to the tenant or to another through whom such tenant claims as grantee: *Weare v. Van Meter*, 42 Iowa, 130, 20 Am. Rep. 616; *Austin v. Barrett*, 44 Iowa, 490; *Blumenthal v. Culver*, 116 Iowa, 326, 89 N. W. 1116; *Phillips v. Wilmarth*, 98 Iowa, 32, 66 N. W. 1053. It is to be noted, however, that in each of the cases cited, and in others where the like rule is declared, the cotenants were in possession or entitled to possession, and each was charged with the duty of protecting the joint estate. And it is under such circumstances that payment by one cotenant is held to be presumably for the benefit

of all, and he who pays may charge the several interests of his cotenants with the proportionate parts which such cotenants should have paid: Cooley on Taxation, 467. The reason for the rule seems to be that, there being a reciprocal duty on the part of the cotenants to pay the taxes assessed, and as a part of the taxes for which the land is sold is a claim upon the purchaser's share, the sale is based in part upon his own default, and it would be inequitable to permit him to profit by his own wrong: 11 Am. & Eng. Ency. of Law, 1st ed., 1082. Here, however, the cotenants in remainder were not in possession, nor did they have any right of possession, and they were not chargeable with the duty and responsibility of making payment of taxes. As between themselves, it cannot be said that there were any reciprocal rights or duties. The duty of paying taxes rested upon the life tenants, and, should one of the remaindermen have seen fit to pay taxes allowed to become delinquent for the protection of the estate, he could not recover any portion of the amount so paid from his coremaindermen. ⁶¹⁵ There being no duty to pay, there could be no such thing as an enforced contribution. It must be manifest that, as applied to such a case, the rule contended for by counsel for appellants can have no force or application. Quite to the contrary, the principle which should be made to govern is that which finds expression in the opinion in the case of *Alexander v. Sully*, 50 Iowa, 192. It was there held that one who, prior to the issuance of a tax deed, had occupied the relation of a cotenant in remainder, and whose estate had been terminated by such deed without his fault or wrong, may purchase the entire estate of the holder of the tax title; and this he may do for his own exclusive benefit. We are content to follow the doctrine of the case cited, and, giving the same application to the case before us it must be said that there was no restriction upon the right of the grantees of David Crawford to acquire and hold title for their own benefit. This being true, it remains to be said that the title of the present owners, derived through such grantees, is not subject to attack at the hands of plaintiffs and intervenor. Passing other matters of defense alleged and insisted upon, we conclude that with respect to the lands under present consideration the decree of the trial court was right, and should be affirmed.

We may consider now the effect of the deed as made by David Crawford to Eliza Crawford. Having in mind the fact that she, with her husband, were simply life tenants under the will of Theophilus Crawford, Sr., we think it clear that the deed

as made to her could have no other effect than to restore the life tenancy and the ownership of the inherited one-sixth interest in the estate in remainder. As life tenant, it was the plain duty of Mrs. Crawford to protect not only her life estate, but the estate in remainder, by the payment of taxes when due: *Olleman v. Kelgore*, 52 Iowa, 38, 2 N. W. 612; *Booth v. Booth*, 114 Iowa, 79, 86 N. W. 51. And certainly a life tenant charged with the duty of paying taxes will be estopped, as against the remaindermen, from claiming to be the owner of the fee title under a tax ⁶¹⁶ deed, it appearing that such tenant has failed in his duty to pay the taxes, and has allowed the lands to be sold therefor; and this is true whether title is sought to be taken directly through the medium of the tax deed or by conveyance procured from one who has purchased at the tax sale. In either case the transaction amounts in law simply to a redemption from the tax sale. To hold otherwise would be to open wide the door to gross frauds and abuses, for, while a remainderman may protect his interest in expectancy by making payment of taxes he has the right to rely upon payment being made by the life tenant, and he may, therefore, as against such tenant, give himself no concern during the continuance of the life estate: *Cooley on Taxation*, 2d ed., 467.

Now, as the deed to Mrs. Crawford had the effect, in legal contemplation, only to redeem the lands from tax sale, and thus restore the prior existing rights, it follows that, speaking strictly, by the deed to the several defendants in these cases in which she and her husband subsequently joined, there was conveyed by them only such interest as they then had, to wit, the life estate covering all the lands thus conveyed, and the one-sixth interest in the estate in remainder derived through the death of their son Alexander. As three of the remaindermen joined in such conveyance, full title was vested in the grantees, subject only to such rights as became reinvested in Charles and Lewis Crawford, as remaindermen, by virtue of the deed from David Crawford to their mother, Eliza Crawford. This the trial court found and decreed, and, further, that the interests thus reinvested in said Charles and Lewis Crawford and the legal heirs of the latter continued in full force at the time of the commencement of these actions—this upon the theory that the statute of limitations, pleaded by defendants, did not begin to run until the death of Eliza Crawford in the year 1899.

The appeal of defendant Meis is addressed to that portion of the decree which denies to him the benefit of the statute ⁶¹⁷ of

limitations, and this presents the only remaining question in the case. It is the contention of appellee that, conceding the effect of the deed to Eliza Crawford when made to have been as stated, still his plea of the statute should have been sustained. On the other hand, it is the position of appellants that, taking the situation to be as stated, and having it in mind that, as related to the one-sixth interest in remainder, the possession of their cotenants was their possession, and that, as related to the life estate, they had no right of entry until the termination of such estate by the death of their mother, it follows that the bar of the statute cannot be successfully asserted as against them. Directing our attention to the question thus made, it is certain that Eliza Crawford and her husband, as owners of a one-sixth remainder interest, and therefore cotenants in expectancy with the other remaindermen, conveyed that interest by their deed to defendants. Aside from such one-sixth interest, and strictly speaking, it is to be said that they conveyed no more by such deed than the life estate interest possessed by them. Now, clearly enough, it is the general rule that the possession of one tenant in common is the possession of all the cotenants and inures to the benefit of all: 17 Am. & Eng. Ency. of Law, 2d ed., 669, and cases cited. But that one cotenant, or a grantee thereof, may work an ouster and disseisin of his cotenants, and, having held adverse possession under claim of right or color of title for the limitation period, may assert full title, and may invoke the bar of the statute in protection thereof as against his cotenants, is also well-settled doctrine: *Burns v. Byrne*, 45 Iowa, 285; *Kinney v. Slattery*, 51 Iowa, 353, 1 N. W. 626; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332, 77 N. W. 469. While in such cases an actual ouster must be made to appear, still this does not of necessity mean an actual physical eviction. As was said in the *Burns* case, it means "a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits." In *Kinney v. Slattery*, 51 Iowa, 353, 1 N. W. 626, it appeared that Jane ⁶¹⁸ Dobbins, a widow, died seised of the lands in question in the year 1860. She left as her only heirs at law a son, W. C. Dobbins, and a daughter, Ann E. Dobbins, since married to J. W. Kinney. In 1862 the former conveyed the land as his own to one Dutton, and the defendant Slattery claims under a conveyance from Dutton. More than ten years later Ann E. Kinney commenced her action to recover an undivided half of said land. The de-

fendant pleaded actual, open and adverse possession for the statutory period. In the course of the opinion it was said that: "The conveyance of the land by W. C. Dobbins as his own, and the possession taken by his grantee under such conveyance, evinced a claim of exclusive right and title, and a denial of the right of the plaintiff. This amounted to an actual ouster and disseisin of the plaintiff." So, too, it may be conceded that as a general rule the limitation statute does not begin to run as against a remainderman until the termination of the preceding estate: *Dugan v. Follett*, 100 Ill. 581; *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241. But the rule supposes an uninterrupted continuation of the relation of life tenant and remainderman. As in the case of cotenants, it does not apply where there has been an ouster and disseisin by the life tenant, or one claiming by or through him, and this under claim of right or color of title, followed by adverse possession for the statutory period. In the recent case of *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869, we distinctly held that, especially in view of our statutes giving to remaindermen and reversioners a right of action to settle disputed questions of title notwithstanding the continued existence of the dominant estate, the bar of the statute may be invoked as against a remainderman, who, knowing that his rights are being disputed or assailed, has failed during the limitation period to assert such rights as against one holding possession adversely and claiming under right or color of title to be the sole owner. It is thought by counsel for appellant that the doctrine thus announced is unsound, and should not be adhered to, but we think otherwise. The rule involves no hardship and the beneficial effect thereof ⁶¹⁹ must be to bring up for settlement disputed questions of title before becoming stale, and while yet the facts are within reach of the parties interested. Accordingly, we are content to give the doctrine this further recognition, and to add thereto the sanction of our present holding.

We may now turn to the record to ascertain whether, as contended for by appellees, the facts in the instant cases warrant an application of the matters of doctrine announced in the cases to which we have made reference. It may be noted, in the first place, that the conveyances by Theophilus, Jr., and Eliza Crawford were by deeds of general warranty. The grantees paid the full value of the property, and at once entered into possession. This continued openly and notoriously down to the time of the commencement of these actions—a period of nearly thirty

years; and incident thereto they have paid all taxes and made many and valuable improvements. All this was well known to plaintiff, Charles Crawford, and to Lewis Crawford in his lifetime, and, following his death, to his heirs. In this connection it may be said that Lewis Crawford became of age about the time the deeds to defendants were executed, and Charles Crawford became of age about the year 1876, so that no question of the rights of minors is involved. Now, it may be conceded that a critical examination of the records of Dubuque county, aided by other evidence suggested thereby, would have revealed the facts in reference to the title to the lands in controversy, and that the grantees of Theophilus, Jr., and Eliza Crawford did not, in point of fact, obtain full and perfect title to such lands. But it is essential only to the running of the statute that there be a good faith claim of right based upon color of title. It appears that Meis had no actual knowledge that his title was defective; on the contrary, he acted upon the belief that he had perfect title in all respects, and this continued down to a short time before these actions were brought. We conclude, therefore, that, taking into consideration the character of the conveyances under which appellee holds, the character of his subsequent possession and the period thereof, the knowledge ⁶²⁰ of plaintiffs and the intervener in respect of all thereof, a case of adverse possession under ouster and disseisin has been made out: See the cases already cited; also, *Leach v. Hall*, 95 Iowa, 620, 64 N. W. 790. This being true, the lapse of time was such as that when these actions were brought the bar of the statute of limitations had long been complete.

It follows that in the Meis case the decree must be, and it is, affirmed on plaintiff's appeal, and reversed on defendant's appeal. In the Luthmers case the decree is affirmed. In the Bartman case, as the plaintiffs were granted all the relief to which they could, in any event, be entitled, and as the defendants in that case have not appealed, the decree is affirmed.

Affirmed on plaintiff's appeal. Reversed on defendant Meis' appeal.

A Valid Tax Title cannot, as a rule, be acquired by one tenant in common against his cotenant: See the monographic note to *Cone v. Wood*, 75 Am. St. Rep. 235-240, on who may purchase and enforce a tax title. Consult, also, the subsequent cases of *McFarlane v. Grober*, 70 Ark. 371, 91 Am. St. Rep. 84, 69 S. W. 56; *Howell v. Shannon*, 80 Miss. 598, 92 Am. St. Rep. 609, 31 South. 965.

One Cotenant may Dissolve the others: *Soper v. Lawrence Bros. Co.*, 93 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908. But see *Scotch Lumber*

Co. v. Sage, 132 Ala. 598, 90 Am. St. Rep. 932, 32 South. 607. And if he conveys the entire property, this constitutes an ouster of his co-owners, and the possession of the grantee may be adverse to them: Beall v. McMenemy, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134; Marray v. Quigley, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; Sudduth v. Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883, and cases cited in the cross-reference note thereto.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

ILLINOIS CENTRAL RAILROAD COMPANY v. MANION.
[113 Ky. 7, 67 S. W. 40.]

EVIDENCE.—Receipts in Full are not conclusive that nothing more is due, but may be shown to be erroneous. (p. 346.)

EVIDENCE.—A Letter from the chief engineer of the defendant to plaintiff, a contractor, proposing a compromise to his claim for extra work is admissible in evidence as an admission, to the extent that it states certain facts are shown by a remeasurement of the work. (p. 347.)

EVIDENCE.—If Parts of Letters are introduced in evidence by plaintiff, defendant is entitled to have the whole of the letters read in evidence. (p. 348.)

CONTRACTS.—Avoidance for Fraud or Mistake.—A condition in a contract for work on a railroad that "the amount of work performed under this contract shall be determined by the measurements and calculations of the engineer in charge," amounts to nothing more than a provision for a means of determining the amount of the work, and either fraud or mistake of the engineer is ground for relief on the part of the contractor. (p. 348.)

CONTRACTS.—Variance by Subsequent Parol Agreement.—Though a written contract stipulates that "no compensation for extra work, and no compensation for any work other than the compensation herein stipulated shall be paid unless ordered or agreed to in writing," yet a recovery may be had for extra work done under a subsequent parol agreement to pay an agreed price therefor. (p. 349.)

CONTRACTS.—Variance by Parol.—Though parties to a contract stipulate that it is not to be varied except by an agreement in writing, they may, by a subsequent agreement, not in writing, modify it by mutual consent, and the parol contract will be enforced, unless forbidden by the statute of frauds. (p. 349.)

CONTRACTS.—Conditions.—If land furnished under an agreement to furnish land necessary for "borrow pits" is not practicable

for the work contracted for, the contractor is entitled to recover money necessarily expended in procuring other land practicable for that purpose. (p. 350.)

Lockett & Lockett, J. M. Dickinson and Pirtle & Trabue, for the appellants.

Yeaman & Yeaman, for the appellee.

⁹ HOBSON, J. Appellee, Peter Manion, in the spring of the year 1899, made a contract with appellant, the Illinois Central Railroad Company, to raise the roadbed of the company across the Ohio river bottoms near Henderson, Kentucky, and brought these suits, which were heard together, to recover a balance alleged to be due him for his work. It is stipulated in the contract that the engineer in charge should certify the amount done each month, and upon his certificate Manion should be paid ninety per cent of the sum earned, the remaining ten per cent to be paid on the final estimate. These certificates were given, and the monthly payments were made. ¹⁰ In December, 1899, a final estimate was made, which showed a balance due Manion of \$5,582.89, and for this he receipted to the company "in full of the above account." His receipt in full is relied on in bar of the action, as well as the five or six monthly receipts previously given during the year. A receipt is not conclusive that nothing more is due. It may be shown to be erroneous, and the facts of this case are not sufficient to bring it within those cases where the account has been held stated.

The plaintiff read in evidence on the trial the following portions of a letter to him from the chief engineer of the company:

"Chicago, February 10, 1900.

"Mr. Peter Manion, Henderson, Ky.

"Dear Sir: Referring to your claim for extra work on account of your contract between Henderson and Evansville, I am advised by Mr. Safford, engineer in charge of the work, that you were allowed 168,079 cubic yards according to the cross section and extra-force account amounting to 4,815 cubic yards, and an allowance for extra width of 1,870 cubic yards, making the total yardage 174,783 cubic yards. According to remeasurement of the bank after it was put up, it was in excess of the estimates rendered the following amounts: On the McClain or north side, 4,243 cubic yards and on the Major or south side, 4,321 cubic yards."

The company, then, not waiving its objection to the reading of this part of the letter, asked that the remainder of it be read, which is as follows: "There is no reason why any allowance should be made for any material put outside the regular bank section. Taking everything into consideration, however, in order to get a final settlement, I am willing to recommend the additional yardage which you put in the south or Major's side. This amounts, as stated, to 4,321 cubic yards; at 13½ cents per cubic yard would amount to \$583.33. If this will be satisfactory, ¹¹ please advise. It is the best that I can do in the matter. You understand that I am willing to recommend this, but cannot give you any absolute assurance that my recommendation will be approved." The court then allowed the whole letter to be read. It is insisted that the letter was only a proposition of compromise, and should not have been admitted.

In 1 Greenleaf on Evidence, section 192, the learned author, after showing that a distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace, adds: "But, in order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or, at least, that they were made under the faith of a pending treaty, and into which the party might have been led by the confidence of a compromise taking place. But, if the admission be of a collateral or indifferent fact, such as the handwriting of the party, capable of easy proof by other means, and not connected with the merits of the cause, it is receivable, though made under a pending treaty. It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But if it is an independent admission of fact, merely because it is a fact, it will be received; and even an offer of a sum by way of a compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential." To same effect see *Church v. Steele*, 1 A. K. Marsh. 328; 1 Am. & Eng. Ency. of Law; 2d ed., 716; *Evans v. Smith*, 5 T. B. Mon. 364, 17 Am. Dec. 74.

The letter came from the chief agent of the company who had charge of this department, and must be regarded its act. In so far as it stated the facts shown by the remeasurement, ¹² it was admissible in evidence, and the court properly so held. He also properly allowed the company to give in evidence the

remainder of the letter, as it was entitled to have the entire document read where part was omitted, if it so desired.

The written contract between the parties contained this provision: "The said work shall be executed in strict conformity to the specifications and such explanatory instructions as may from time to time be given by the said chief engineer or the engineer in charge of the work. The amount of work performed under this contract shall be determined by the measurements and calculations of the engineer in charge of the work, who shall have full power to condemn and reject any and all work which, in his opinion, does not conform to the requirements hereof. Should any dispute arise between the parties respecting the true construction or meaning of the specifications, the same shall be decided by the said chief engineer, and his decision shall be conclusive and binding upon all parties hereto."

It is earnestly maintained for the company that the estimates of the engineer in charge are conclusive on Manion, unless fraudulent, or so grossly erroneous as to imply fraud or a failure to exercise an honest judgment: *City of Covington v. Limerick*, 19 Ky. Law Rep. 330, 40 S. W. 254, and cases cited. The contract in this case is different from that in the *Limerick* case. That contract provided that the decisions of the engineer should be final and binding on both parties. There is no such provision in the contract before us. It simply provides that the amount of work performed under the contract shall be determined by the measurements and calculations of the engineer in charge. This is nothing more than a stipulation for a means of determining the amount of the work, and the determination by the engineer is entitled ¹³ to no more weight than a determination by the concurrent act of the two parties under a provision requiring the amount of work to be done to be settled in that way. If the engineer was guilty of fraud or made a mistake, it may be shown. Fraud or mistake is a ground for relief from a settlement made by the parties themselves, and we see no reason why the same rule should not apply to a settlement made for them by the servant of one of them alone, unless the contract expressly provides otherwise: 2 *Wood's Railway Law*, 1141; *Memphis etc. R. R. Co. v. Wilcox*, 48 Pa. St. 161; *Railway Co. v. Cummings*, 6 Ky. Law Rep. 441; *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407.

The contract also contains this clause: "It is expressly agreed that no compensation for extra work and no compensation for any work other than the compensation herein stipulated shall

be paid to the party of the first part, unless ordered or agreed to in writing by the said chief engineer." Some of the items sued for are for extra work not ordered or agreed to in writing by the chief engineer, and it is insisted that for this there can be no recovery. As to some of these items there is no dispute in the evidence that the work was done under a contract by which Manion was to be paid for it at an agreed price. As to others the dispute seems to be only as to whether the extra work should be paid for at thirteen and one-half cents a cubic yard, according to the written contract, or at the stipulated price claimed by him. The company received the work, and has enjoyed the benefits of it. Its agents in charge of its affairs superior to the engineer in charge knew it was done.

Though the parties to a contract may stipulate that it is not to be varied, except by an agreement in writing, they may, by a subsequent contract not in writing, modify it by mutual consent, and the parol contract will be enforced, unless ¹⁴ forbidden by the statute of frauds. In Bishop on Contracts the rule is thus stated: "Though the written contract has a clause forbidding such oral alteration, and declaring that no change in it shall be valid unless in writing, such provision does not become a part of the law of the land; it is like any other agreement which is superseded by a new one. So that in spite of it an oral alteration may be validly made": Bishop on Contracts, sec. 767. "Any contract may be varied by the parties before performance; for the power from the law to enter into the bargain equally authorizes them to abrogate or modify": Bishop on Contracts, sec. 776. See, also, *Imerson v. Bridge Co.*, 5 Ky. Law Rep. 685; *Baum v. Covert*, 62 Miss. 113; *Lewis v. Yagel*, 77 Hun, 337, 28 N. Y. Supp. 833; *Van Deusen v. Blum*, 18 Pick. 229, 29 Am. Dec. 582; *Escott v. White*, 10 Bush, 175.

By another clause of the contract it was stipulated: "The material shall be taken from such places as may be directed by the said chief engineer or the engineer in charge of the work. Land necessary for borrow pits shall be furnished by the party of the second part (appellant), and the party of the second part shall do all necessary track work." At one point in the work the borrow pit from which the engineer in charge directed the material to be taken was so inaccessible according to the appellee's proof, that it was impracticable to get it therefrom, and he then bought a borrow pit from which he got the material. The court instructed the jury that they could find for him the

amount necessarily expended in this way if the borrow pit furnished by the defendants was not practicable for the work, but that if it was reasonably accessible, and Manion made the change merely for his own convenience, they should find nothing for him on this account. This was proper. The company, by the terms of the contract, was to furnish appellee "land necessary for borrow pits." Lands which could not practically be used¹⁵ for borrow pits was not such as the contract contemplated. The word "necessary" must be given a reasonable construction, and the court properly submitted the matter to the jury by the instruction referred to.

It is unnecessary to notice in detail the other matters relied on for reversal. None of them affect the substance of the case. The instructions fairly submitted the issues to the jury, and their verdict is not so against the evidence as to warrant us in disturbing it.

Judgment affirmed.

Petition for rehearing by appellant overruled.

That a Receipt may be explained or varied by parol evidence, see the note to *Sullivan v. Lear*, 11 Am. St. Rep. 393, 394; *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Chapel v. Clark*, 117 Mich. 638, 72 Am. St. Rep. 587, 76 N. W. 62.

Statements Made in the Course of Negotiations for Compromise according to *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11, cannot be admitted in evidence against the party making them, if the effort to compromise proves abortive. But see *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454, 5 N. E. 695; *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782.

Subsequent Parol Agreements to vary writings are discussed in the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.

TRICE v. SHIPTON.

[118 Ky. 102, 67 S. W. 377.]

WILLS—Revocation—Fraud Preventing Destruction of Will.—Fraud on the part of the testator's wife, who is sole devisee under his will, in falsely representing to him that it has been destroyed, whereby he is prevented from destroying it or executing another, is not ground for the revocation of such will. (p. 352.)

WILLS—Revocation.—Courts cannot substitute for the plain requirement of the statute the supposed desire, intention, or even unaccomplished attempt of a testator to destroy or revoke his will. (p. 353.)

Lockett & Lockett and J. W. Mahan, for the appellants.

J. W. Bourland and Bourland & Henson, for the appellees.

¹⁰² DU RELLE, J. A paper propounded as the last will of S. D. Trice, whereby he gave all his property to his wife, was duly probated in 1896. The widow subsequently remarried and died, and after her death, and some three years after the probate, an appeal was taken from the judgment of probate by Trice's heirs. The grounds of the contest were lack of mental capacity and undue influence, and the jury seems to have been properly instructed on these questions. They found in favor of the will.

Evidence was introduced that, a short time before the testator died, he said that he had made a will, and his wife said that that will was destroyed; that he then stated that he wanted his property to go to his wife, with remainder to his family; that he had spoken of his will as having been destroyed. Another witness testified that, some three ¹⁰³ years before his death, she asked him if he had made a will, and he replied that he had no will; that he had made one, but it was destroyed; and his wife confirmed the statement that it was destroyed. Upon this testimony an instruction was asked as follows: "Even if the jury believe from the evidence that the paper in question was freely executed by S. D. Trice, yet if they further believe from the evidence that he afterward wished and intended to destroy said paper, and that his wife, to prevent it, represented to him that said paper was destroyed, and, he relying upon that representation, was prevented from destroying said paper or making another as his will, this is such undue influence and fraud as renders said paper invalid, and the jury will find said paper not to be his will." It is argued with considerable

force that this evidence tended to show a fraud upon the testator, and that by the direct fraud of his wife he was made to believe his will had been destroyed, and thereby prevented from revoking it by himself destroying it, as he desired and intended; that this fraud can, in probate proceedings, be shown as the basis for a verdict setting aside the will on the ground of fraud, on behalf of the heirs at law. On the other hand, it may be urged that such statements are sometimes falsely made by testators to avoid annoyance from their kindred, and that, even if the statements of which testimony has been given be admitted to show a desire for the destruction or revocation of his will, it does not at all follow that if he had known the will was still in existence he would have actually destroyed or revoked it. But we do not think there was any question to submit to the jury. The statute (Kentucky Stats., sec. 4833) seems directly to provide the mode whereby a will may be revoked, in whole or in part, and to peremptorily prohibit any other mode of accomplishing this purpose: ¹⁰⁴ "No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke." In *Toebe v. Williams*, 80 Ky. 665, 4 Ky. Law Rep. 563, in an opinion by Chief Justice Hargis, it was said, referring to section 10, chapter 113 of the General Statutes, which is substantially re-enacted in the section we have quoted: "Evidence of verbal statements made by the testator, after making his will according to the forms of law, to the effect that he has not made a will do not constitute a revocation, and possess but little value, and when permitted to go to the jury they should be instructed that such statements do not tend to prove revocation, and furnish no light in construing the written acts of the testator." In *Gains v. Gains*, 2 A. K. Marsh. 190, 12 Am. Dec. 375, a case was unmistakably made out of the forcible prevention by the devisee of the destruction of a will by the testator. The devisee snatched it from his hand and forcibly retained it after the testator had sent for it with the announced desire to destroy it. It is true that, in that case the court held the testator's mind was at the time so impaired by disease as to render him incapable of acting efficiently for the purpose of revocation.

But the court said, in an opinion by Chief Justice Boyle: "But, admitting the competency of the testator, at the time, to have revoked his will, and that he was prevented from doing so by the conduct of the defendant in error, we should still think that the will was not thereby revoked. The act concerning wills, after having prescribed the manner in which ¹⁰⁵ a will shall be made, provides 'that no devise, so made, or any clause thereof, shall be revocable but by the testator's or testatrix's destroying, canceling or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing, made as aforesaid.' None of these acts were done, and we cannot, under any circumstances, substitute the intention to do the act for the act itself. Construction is admissible only where there is ambiguity; and there is no ambiguity in the provision referred to. To substitute the intention to do the act, instead of the act itself, without which the statute expressly declares the will shall not be revocable, would be changing the law, not expounding it. A devisee who, by fraud or force, prevents the revocation of a will, may, in a court of equity, be considered a trustee for those who would be entitled to the estate, in case it were revoked; but the question cannot with propriety be made in a case of this kind, where the application is to admit the will to record." In *Runkle v. Gates*, 11 Ind. 95, a similar question was presented, with the same result, the fraud in that case having been confessed by the devisee: See, also, *Jarmin on Wills*, c. 7, sec. 2.

The law has pointed out the mode in which wills may be revoked. It has, in effect, forbidden any mode of revocation save that permitted by the statute. The courts cannot substitute for the plain requirement of the statute the supposed desire, intention, or even the unaccomplished attempt, of the testator to destroy his will. If a testator on his deathbed should send for his will for the avowed purpose of its destruction, and should die before it reached him, or even with the instrument in his hands for that purpose, it could hardly be maintained that a revocation had been accomplished, within the meaning of the statute. To hold ¹⁰⁶ that an expressed intention to destroy a will, or an expressed belief that it had been destroyed—and that such intention or belief can be proven by statements made, very possibly, for the purpose of misleading the kindred of the testator—could take the place of the formal and definite revocation provided for by the law, would violate

the plain letter and spirit of the statute and create an open door for fraud.

The testimony objected to does not seem to be such as could have operated prejudicially. For the reasons given, the judgment is affirmed.

Decisions involving questions similar to that passed upon in the principal case will be found in the monographic notes to *Giddings v. Giddings*, 48 Am. St. Rep. 198, 199; *Graham v. Burch*, 28 Am. St. Rep. 347.

HOME INSURANCE COMPANY OF NEW YORK v. KOOB.

[113 Ky. 360, 68 S. W. 453.]

INSURANCE—Waiver of Proof of Loss.—Denial of liability by an insurer for a loss by fire constitutes a waiver of proof of such loss. (p. 355.)

INSURANCE, FIRE—Condition Against Other Insurance—Owner and Mortgagee.—If an owner of property accepts a policy of fire insurance thereon, containing a condition that it shall be void if other insurance is taken on the insured property, the fact that the mortgagee of such property subsequently takes other insurance on his interest does not avoid the owner's insurance, especially when neither knew that insurance had been procured by the other. (p. 357.)

INSURANCE, FIRE—Misrepresentation—Burden of Proof.—In the absence of fraudulent intent, the burden of proof is on an insurer to show that a misrepresentation by the insured as to the amount he owed on a mortgage on the property insured, was material to the risk. (p. 359.)

INSURANCE, FIRE—Other Insurance—Contribution.—If an owner and a mortgagee of the same property have procured insurance on their separate interests therein, and the owner seeks to recover on his policy, the defendant insurer is not entitled to contribution against the insurer of the mortgagee's interest. (p. 360.)

I. T. Woodson, for the appellant.

S. E. Sloss, W. W. Thum and F. Forcht, for the appellees.

³⁶³ O'REAR, J. Appellee Koob owned a double frame house on Lombard street, Louisville. He mortgaged it in 1894 to the Kentucky Citizens' Building and Loan Association to secure a ³⁶⁴ loan of seven hundred dollars, payable in monthly installments, on the familiar building association plan. At the same time he contracted with appellant for an insurance against loss or damage by fire to the building to the extent of eight hundred dollars. The policy was indorsed, "Loss, if any,

payable to the Kentucky Citizens' Building and Loan Association, mortgagee, as its interest may appear," etc. The bond from Koob and wife to the building association contained this stipulation: "Now, if we pay promptly the monthly interest on said sum of seven hundred dollars, and the monthly premiums of three dollars and fifty cents offered by us for said loan, and the monthly payments on said shares of stock, and any fines assessed under the rule of said association, and the taxes accruing on the lot of land described in the mortgage securing this obligation, and the premiums necessary to keep the improvements on said lot insured in such sum as said association may require (not exceeding seven hundred dollars) until the said stock becomes fully paid in and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said association this note shall be deemed fully paid and canceled." In March, 1899, the policy of insurance above named expired. In the meantime the building association had made a deed of assignment to appellee W. R. Logan in trust for all its creditors, transferring to him under the deed the note and mortgage executed by Koob. Logan notified Koob of the expiration of the policy, and requested reinsurance. To this notice Koob failed to respond, and Logan, as assignee of the mortgagee, and without the knowledge of Koob, effected an insurance with the appellee, Agricultural Insurance Company, insuring the mortgagee's interest against loss or damage to this property by fire in the sum of five hundred dollars. The premium for this insurance was paid by Logan, assignee, and charged to ³⁶⁵ Koob. About the same time, at the instance of appellant's local agent, Lang, Koob took this insurance on the property in a policy for eleven hundred dollars. This was done without the knowledge of Logan. Neither insurance company knew of or consented to the other's insurance. The property was damaged by fire during the existence of these policies, and the loss fixed by the appraisers at five hundred and forty-nine dollars and sixty-eight cents. Koob has sued the appellant insurance company on the policy issued to him, and Logan, assignee, has also sued appellant (and Koob), attaching the sum that may be owing Koob under the policy. The defenses interposed were: 1. It was claimed by appellant that under certain terms of its policy, hereinafter particularly noticed, the existence of the Agricultural Company's policy on this property, without appellant's consent, voided the policy sued on; 2. That

Koob falsely and fraudulently misrepresented to appellant the extent of the mortgage lien upon the property, which misrepresentations are claimed to have been material to the risk; 3. That, in any event, if liable on the policy at all, under a certain clause of the contract its liability was limited to a sum represented by the ratio borne by its policy to the whole of the insurance in existence upon the building.

A preliminary question was made by appellant that Koob had not sufficiently complied with the terms of his policy in furnishing proofs of loss as required. In a letter to Koob from appellant's adjuster, dated January 26, 1900, before the suit, it was stated: "The Home Insurance Company hereby gives notice that any and all liability for said loss is denied." In the answer of appellant it likewise denies all liability for the loss. These constituted a waiver by the insurer of proofs of loss: *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 19 Ky. Law Rep. 204, 39 S. W. 434; ³⁰⁸ *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 10 Ky. Law Rep. 254, 8 S. W. 453; *Orient Ins. Co. v. Clark*, 10 Ky. Law Rep. 1066, 59 S. W. 863; *Phoenix Ins. Co. v. Gibbons*, 23 Ky. Law Rep. 1130, 64 S. W. 909. One of the conditions of the policy sued on was that, "If now or hereafter there be other insurance on any property hereby insured, this policy shall be void, unless otherwise provided by agreement indorsed hereon." Do the two policies constitute what is termed "other insurance"? The manifest purpose of this and similar provisions in the policies of insurance, as well as of the law in favoring them, is to prevent the temptations arising out of overinsurance—temptation to the insured to either burn his building for the gain or to neglect its care. If the interest of the insured be a life estate in the property, it could not matter to him—certainly could not profit him—whether the remaindermen were or not insured, if he had not ample insurance to indemnify his individual loss: *Franklin etc. Ins. Co. v. Drake*, 2 B. Mon. 47. Therefore, it was held in the Kentucky case just cited that, where the insurance was independently effected upon distinctive interests, it did not constitute "double insurance," within the meaning of such clauses. Here, though, it is said that the insurance effected by the mortgagee was indirectly for the owner's benefit; for, in event of loss of the building by fire, the mortgagee's insurance would, if sufficient, extinguish the mortgagor's debt. That might or might not be true. But in this case it may be accepted as true. Still we must construe appellant's liability on

the terms of its contract, or by the manifest "justice" of the case. If the latter be invoked, then it seems a sufficient response that Koob and Logan were each ignorant of the insurance effected by the other; neither had the legal right to control the act of the other, nor to prevent the issuance ³⁶⁷ of the respective policies to the other. Therefore, the idea which lies at the bottom of the doctrine disfavoring double insurance, to wit, to prevent the overbalancing self-interest in the insured to destroy or neglect his building, is wanting in this case; for, unless he knew of the other insurance, and contemplated its possible advantage to him, it could not have influenced his action. But the terms of the policy are, after all, the safest, as they are the legal method of determining the insurer's liability. The contract provides, "If now or hereafter there be other insurance on any property hereby insured, this policy shall be void." It is too well settled to require either argument or citation of authority that an insurance effected by one having an insurable interest in the property will not inure to others having also an interest in the property, and not named in the contract, whether they be joint tenants, remaindermen, tenants, or lessors. It therefore follows that the thing insured is not the property, but the interest or estate, of the insured therein. We must, then, construe the term in the policy, "any property hereby insured," to mean the insured's interest or title in the property described. 3 Joyce on Insurance, section 2470, thus states the rule: "The general rule that different persons, each having a different interest in property, may insure that interest, also prevails where different policies are effected by the mortgagor and mortgagee upon the property. The mortgagor may insure the property to cover his interest, and the mortgagee may likewise insure his interest in the property, and it will not be within the meaning of the clause as to other insurance." It is further argued that in this case the mortgagor, Koob, authorized his mortgagee, the building association, to effect the insurance, and therefore the act of the mortgagee was the act of the mortgagor ³⁶⁸ in procuring the Agricultural company policy. The agreement of the mortgagor was that he would keep the premises insured to the extent, at least, of the mortgage debt. In addition to the language already quoted from Koob's bond is this statement found therein: "But if we fail to pay promptly when due and payable the said taxes and insurance premiums, . . . then, at the option of the said association, the whole indebtedness evidenced by this obli-

gation (including any taxes and insurance premiums due or paid by said association) shall at once become and be due and collectible." No express authority is here given the association to contract for insurance upon this property. It may be inferred, though, that upon default by the mortgagor to keep the premises insured to at least the balance of the mortgage debt, with a clause protecting the mortgage therein, the mortgagee was authorized to effect such insurance on the owner's behalf—that is, an insurance of the owner's title and property to the amount of seven hundred dollars (the sum required by the bond)—with loss payable to the mortgagee as its interest might appear. But the mortgagee did not do this. On the contrary, it procured an indemnity to itself from loss by fire on its interest in this property. That its assignee charged or attempted to hold the mortgagor liable for the premium for this insurance is not material. The insurance effected by the mortgagee was exactly what he had the right to do without a contract with or the consent of the owner. It was independent of that part of the agreement with the owner quoted above. It shows on its face that it was, and the assignee so testified. We conclude that there was not "other insurance on the property" of appellee Koob within the meaning of that term as construed in law.

³⁶⁹ The case of *Sun Insurance Office v. Varble*, 103 Ky. 758, 20 Ky. Law Rep. 556, 46 S. W. 486, 41 L. R. A. 792, is relied on by appellant as sustaining a contrary view. In that case it must be noted that the language of the policy is materially different from the one at bar. In the *Varble* case it was: "In case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein." This court held that the "insurance companies had the right to place in their policies provisions defining and limiting their several liabilities"; that they, in that policy, "by express and unmistakable language, limited their liability so that they would not be required to pay a greater portion of any loss sustained than the sum they respectively insured bore to the whole amount on the property." The insurance held by any party having an insurable interest in the property was, therefore, under the terms of the policy, required to be taken into account. To the same effect, and upon a similar policy to the one construed in the *Var-*

ble case is *Hartford Fire Ins. Co. v. Williams*, 11 C. C. A. 503, 63 Fed. 928. The case of *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. ed. 868, was an instance where policies were taken out by the warehousemen "for their own and for the owner's benefit." Other policies were taken out on the same goods by the owners. It was held that the policies should bear ratably the loss. That case is not in conflict with the views herein expressed. The other cases cited by appellant (*Insurance Co. v. Coons*, 14 Ky. Law Rep. 110, and *Baer v. Phoenix Ins. Co.*, 4 Bush, 242) ³⁷⁰ were cases where all the policies were issued to the same party.

Pending the negotiation between Koob and appellant's agent for this insurance, the fact of the mortgage on the property was discussed. Appellant charges—and upon that rests one of its defenses—that Koob fraudulently and falsely misrepresented the amount owing on the mortgage debt, and that the misrepresentation was material. The burden upon this plea was, of course, on appellant. To sustain it, its local agent, Lang, was introduced as its witness. He testified that Koob told him that "he was paying off his mortgage"; that it was to some building association; that it was then a balance of one hundred dollars, one hundred and fifty dollars or two hundred dollars. His testimony shows his memory to be very unsatisfactory as to what actually occurred, further than that Koob told him there was some balance, from one hundred dollars to two hundred dollars, owing on the mortgage to the building association. Koob testified that he told Lang of the mortgage; that he had been paying it off, but had stopped; that he thought he would be owing the association two hundred dollars or three hundred dollars or four hundred dollars balance, "with interest added." His memory does not appear to be much better than Lang's. His testimony indicates him to be an illiterate, ignorant man. In fact, we may easily see that he did not know what balance he was owing on his mortgage. His payment "on dues" amounted then to one hundred and ninety-five dollars. He doubtless thought, as many persons have, that this sum was to be credited on his debt. If this had been so, the debt would have been three hundred and fifty-five dollars. There is nothing to indicate that he intended to deceive the company's agent as to the amount of this debt. In this state these and similar statements are not warranties, but are representations only. And under section 639 of the Kentucky Statutes it is also provided: "Nor shall any misrepre-

sentation, unless material or fraudulent, prevent a recovery ³⁷¹ on the policy." A comparison of the testimony of these two witnesses shows an entire absence of fraudulent motive. It also shows that Koob was admittedly unable to, and did not pretend to, give accurately the amount owing on the mortgage. The very fact that he is alleged to have represented it as running from one hundred dollars, one hundred and fifty dollars, to two hundred dollars was notice to his auditor that he could not and did not pretend to give the exact amount of balance owing. But we are authorized in adopting the estimate of those two witnesses, placed upon them by their chancellor, which was under the rule as to burden, to accept appellee Koob's statements, and the maximum sum stated by him is so near the true sum, five hundred and eighty-two dollars and fourteen cents, as that the difference, under the circumstances, cannot be held to have been material to this risk: *Light v. Greenwich Ins. Co.*, 105 Tenn. 480, 58 S. W. 851. It follows from what has been said that, as there was not "other insurance," within the meaning of the law, upon appellee Koob's property, appellant was not entitled to prorate the loss with the policy issued to the mortgagee on his independent interest. Nor was appellant entitled to maintain a cross-petition against the Agricultural Insurance Company for contribution. In denying a similar attempt in *London etc. Ins. Co. v. Turnbull*, 86 Ky. 236, 9 Ky. Law Rep. 544, 5 S. W. 542, this court held that the utmost of that clause was a defense to the company insuring against the pro rata of the loss represented by the other policies, "and whether they [the insured] ever recovered the pro rata due by the other companies was a matter about which the appellant had no concern, and it should not have been allowed to meddle with it."

Judgment affirmed, with damages.

Procuring Additional Insurance in violation of the express terms of the first policy avoids it: *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 South. 116; *O'Leary v. Merchants' etc. Ins. Co.*, 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420. As to whether additional insurance obtained by one mortgagor violates a condition against "additional insurance," see *Gillett v. Liverpool etc. Ins. Co.*, 73 Wis. 203, 39 Am. St. Rep. 784, 41 N. W. 78. It seems that a policy to a mortgagee is not avoided by subsequent insurance by the mortgagor: Note to *Thomas v. Builders' etc. Ins. Co.*, 20 Am. Rep. 321. As to what is double insurance, see *Copeland v. Phoenix Ins. Co.*, 96 Ala. 615, 38 Am. St. Rep. 134, 11 South. 746; *Clarke v. Western Assur. Co.*, 146 Pa. St. 561, 28 Am. St. Rep. 821, 23 Atl. 248, 15 L. B. A. 821.

CITY OF LEXINGTON v. THOMPSON.

[113 Ky. 540, 68 S. W. 477.]

CONSTITUTIONAL LAW—Right to Local Self-government.—Municipal corporations have a right to local self-government, and it is not within the power of the legislature to permanently fill by appointment and fix the compensation of the local or municipal offices established by law for purely local purposes. (p. 363.)

CONSTITUTIONAL LAW.—Laws may be Declared Invalid, although not repugnant to any expressed restriction contained in the state constitution. (p. 367.)

CONSTITUTIONAL LAW—State Interference with Municipal Government.—A statute fixing the compensation to be allowed the officers and members of a municipal fire department, created for purely local purposes, is void as violative of the right of the municipality to govern and control its purely local affairs. (p. 372.)

W. S. Bronston, city solicitor, for the appellant.

Kinthead & Miller, for the appellee.

543 DU RELLE, J. By the fourth section of an act amending the act for the government of cities of the second class, approved March 15, 1900 (Acts 1900, p. 15), it was provided: "The said fire department shall consist of one chief, whose salary shall not be less than one hundred and fifty dollars per month; the engineer's salary shall be eighty dollars per month; the electrician's salary shall be seventy dollars per month, and the ordinary fireman's salary shall be sixty-five dollars per month." The appellee, Thompson, brought suit against the appellant, the city of Lexington, a city of the second class, alleging that he was a resident of that city, and employed by it as an ordinary fireman, having been appointed by the board of police and fire commissioners; that prior to the passage of the act his salary as fireman was fifty dollars per month, and by that act was increased to sixty-five dollars per month; that he continued to serve as ordinary fireman up to July 22, 1901, when he resigned; that from time to time he made demand upon the city for the increase of salary provided for by the act at the rate of fifteen dollars per month, which was refused. His prayer was for judgment for the difference between the salary paid him and that fixed by the act during the period from March 15, 1900, to July 22, 1901, aggregating two hundred and forty-three dollars and seventy-five cents. A demurrer to the petition was filed and overruled. The city stood by its demurrer, and judgment was

rendered against it. The ground of the demurrer is that ⁵⁴⁴ the act is violative of the right of local self-government by the city in a matter over which the municipality has exclusive control in its private or corporate capacity, and that the act is therefore void.

For appellee it is contended that the act does not violate any provision of the constitution of the state, and therefore cannot be declared void because it is, or is supposed to be, in violation of the spirit which may be supposed to pervade that instrument. Mr. Cooley is quoted in support of this proposition: "If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution. The principles of republican government are not a set of inflexible rules, vital and active in the constitution, though unexpressed, . . . nor are courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words": Cooley's Constitutional Limitations, 5th ed., pp. 202-204. Numerous other authorities are cited in support of the doctrine thus laid down, and among them the opinion of Chief Justice Robertson in *Griswold v. Hepburn*, 2 Duvall, 24, where, after discussing the difference between the federal constitution as a grant of power and the state constitution as a written limitation upon the powers of the legislative organ of the people, it is said: "But the same reason being inapplicable to state legislation of doubtful compatibility with a state constitution, proper deference to the legislative department should preponderate in favor of the constitutionality of its acts, and requires the judicial department to recognize ⁵⁴⁵ them as laws, unless it shall be clearly satisfied that they are not. Whenever a jurist inquires whether a state statute is consistent with the state constitution, he looks into that constitution, not for a grant, but only for some limitation of the powers inherent in the people's legislative organ so far as not forbidden by their organic law." These general principles may be freely conceded. It is also urged that, as said by the supreme court in *United States v. Baltimore etc. R. R. Co.*, 17 Wall. 329, 21 L. ed. 597, a municipal corporation is not only a representative of the state, "but is a portion of its governmental power. It is one of its creatures,

made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence." These general statements of the legislative power over municipal affairs are always to be read in the light of the state of fact to which they are applied by the courts which give them utterance. Unless so read, they are apt, at times, to be misleading. In fact, the very authorities which thus state the general rule state also the limitations to be placed upon it. Speaking of the limitation upon legislative power, Judge Cooley says: "It does not follow, however, that in every case the courts, before they can set aside the law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to the general grant or power; and, if the authority to do an act has not been granted by ⁵⁴⁶ the sovereignty to its representatives, it cannot be necessary to prohibit its being done": Cooley's Constitutional Limitations, 5th ed., p. 203. So, Von Holst (Von Holst's Constitutional Law, 271), after stating the general rule that the legislative power of the state legislatures is unlimited so far as no limits are set to it by the federal or state constitution, proceeds: "This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the federal government have certain implied powers, so it has never been disputed that the state legislatures are subject to 'implied restrictions'; that is, restrictions which must be deduced from certain provisions of the federal or state constitutions, or that arise from the political nature of the Union, from the genius of American public institutions." And in *Mechem on Public Officers*, section 123, it is said: "Indeed, this right of local self-government, as it has been briefly termed, is held to be an established feature and incident of our political system, and it is not within the power of the legislature of a state to permanently fill by appointment the local offices established by law for purely local purposes": See, also, *Cincinnati etc. R. R. Co. v. Clinton Co. Commrs.*, 1 Ohio St. 77. Said Mr. Edward Bates, in his argument in *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 13, cited with approval in Cooley's Constitutional

Limitations, 5th ed., p. 49, a constitution is "not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made. It is ⁵⁴⁷ but the form and framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. . . . A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents." And Mr. Webster said: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." A municipality is a state agency for governmental purposes. It exercises political governmental powers delegated by the state. As to such powers, and as to the duties which attach to their exercise in the administration of justice and the preservation of the public peace, it is imperium in imperio; a part of the governmental machinery of the commonwealth. Therefore, its charter and legislative acts regulating the use of state property held by it did not constitute contracts within the meaning of the constitutional provision. Its political powers are not vested rights as against the state. As well said by Mr. McQuillin in a recent article upon the subject (34 Am. Law Review, p. 506): "It is thus manifest that in matters of public concern, such as relate to the performance of functions by the city as the agent of the state, the legislature is not limited to conferring a discretionary power, but may exercise authority where the local officers or agencies neglect or refuse to discharge their public duty in providing for the public needs of the locality, or in voting or levying the proper taxes for public purposes. As to duties which the people in the several localities owe to the state at large, they cannot be allowed a discretionary authority to perform them or not, as they may choose, for such authority would be wholly inconsistent with anything like regular and uniform government of the state."

⁵⁴⁸ The conceded legislative control over the exercise of these governmental functions has furnished the subject of numerous adjudications. What constitutional limitations, either express or implied, existed upon the exercise of this legislative control

it is not necessary, nor is it our purpose, in this case to determine. But a municipal corporation is not merely a public agency of the state. Its governmental functions are not all the functions which it possesses or exercises. It is, in part, a corporation possessed of private franchises and rights, which it may exercise for its private, corporate advantage, for the benefit of the community, as distinct from the state government. It may hold and manage property, not for the benefit of the state, but to supply local needs and conveniences; and in respect thereto it acts as a private corporation, and in that capacity may sue and be sued. "With respect to its private or proprietary rights and interests," it is entitled to the protection of the constitution, like other corporations: *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142, 35 L. ed. 943. Assuming that as to the governmental functions of a municipality the contention of appellee is true to its broadest extent, and that what the legislature gives to the municipality by its act of incorporation it may alter or destroy at pleasure, it does not at all follow that the rights and privileges of the local community, which become vested in the corporate entity created by the legislature for the benefit of the community, are likewise subject to the legislative control. The legislature cannot take away from the community rights or property which existed or were acquired without the aid of legislation. A municipality has a dual character. In its character as a state agency it exercises governmental, political, public and administrative powers and duties. In ⁵⁴⁹ its capacity as a private corporation it exercises rights and powers inherent in the people of the community, which have never been surrendered to any department of the government, and which are property rights within the protection of the constitution. Among the earliest courts to recognize this dual capacity of municipalities are those of Kentucky. The question arose upon a claim by the city of Louisville to exemption from state taxation. In that case (*City of Louisville v. Commonwealth*, 1 Duvall, 297, 85 Am. Dec. 624) this court, through Judge Robertson, said: "But a municipal corporation, like a state, a county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power; and each, in its prescribed sphere, is '*imperium in imperio*.' All are constituent elements of one total sovereignty. The city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from

the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality. The tax law of Kentucky constructively applies to persons only, and not at all to political bodies exercising in different degrees the sovereignty of the state. . . . And if, notwithstanding the specified exceptions, the public property of the state and counties is exempt, the same reason exempts the public property of Louisville used for carrying on its municipal government. But, so far as any of its property may be used, not for that purpose, but only for the convenience or profit of its citizens individually or collectively, this it owns and uses as a private corporation, and, like the property of all such corporations not expressly exempted, it is a legal subject of assessment for taxation. The more precise and distinctive test for classification ⁵⁵⁰ is this: Whatever property, such as courthouse, prison, and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation, but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, and the like, is subject to taxation." Mr. Dillon thus states the distinction: "The administration of justice, the preservation of public peace, and the like, although confided to local agencies, are essential matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gasworks and waterworks, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large": Dillon on Municipal Corporations, sec. 58. The Massachusetts court, recognizing the waterworks, markets, hospitals, cemeteries, libraries, and the system of parks of Boston as established "for the benefit of the public," declares them to be "held more like the property of a private corporation," and therefore protected from legislative interference: *Mt. Hope Cemetery v. City of Boston*, 158 Mass. 519, 35 Am. St. Rep. 515, 33 N. E. 695. And again, in *Dillon on Municipal Corporations*, section 12a, it is said: "In many of its more important aspects, a modern American city is not so much a miniature state as it is a business corporation, its business being to wisely administer the local affairs and economically expend the revenue of an incorporated community. As we learn this lesson, and apply busi-

ness methods to the scheme of municipal government and the conduct of municipal affairs, we are on the right road to better and more satisfactory results." In Nebraska the legislature passed an act establishing a ⁵⁵¹ board of police and fire commissioners, to be appointed by the governor, to whom there was given all powers and duties connected with the appointment, removal, and discipline of the members of the police and fire departments. It was there held (*State v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624, overruling a former decision) that the act was void. Said the court: "It is true that the state constitution is not a grant of legislative power, and the law-making body may legislate upon any subject not inhibited by the fundamental law; but it by no means follows from this that the legislature is free to pass laws upon any subject unless in express terms prohibited by the constitution. The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be and have been declared invalid, although not repugnant to any express restriction contained in the fundamental law." To the same effect, see *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. The same conclusion was reached as to a similar law of Indiana in the cases of *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, and *State v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. In the case first named the court said: "The construction of sewers in a city, the supplying of gas, water and fire protection, and many other matters that might be mentioned, are matters in which the local communities alone are concerned, and in which the state has no special interest; and they are matters over which the people affected thereby have exclusive control, and it cannot, in our opinion, be taken away from them by the legislature." In *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. St. 183, 72 Am. Dec. 730, Chief Justice Lewis, delivering the opinion of the court, said: "The supply of gaslight is no more a duty of sovereignty than ⁵⁵² the supply of water. Both these objects may be accomplished through the agencies of individuals or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands

and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises have been conferred."

The distinction between the two capacities in which a municipality may act is nowhere better stated than in the two great opinions of Judge Cooley in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202. In the former case the question was as to the power of the legislature to appoint permanent officers for the full term, whose duties were purely municipal, and arose over an act which created and appointed a board of public works. In the opinion by Judge Cooley, it was said: "In the case before us, the officers in question involve the custody, care, management and control of the pavements, sewers, waterworks ⁵⁵³ and public buildings of the city, and the duties are purely local. The state at large may have an indirect interest in an intelligent, honest, upright and prompt discharge of them, but this is on commercial and neighborhood grounds, rather than political, and it is not much greater or more direct than if the state line excluded the city. Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to be the best authorities, as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. . . . Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and, generally, to seek happiness

in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just as regardful of private rights and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where, in the constitution, the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. . . . The state may mold local institutions according ⁵⁵⁴ to its views of policy or expediency; but local government is a matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but, at discretion, sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs or no control at all." In the latter case of *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202, the question was more nearly similar to that presented in the case at bar. It was the question of the legislative power to compel local improvements, which is practically the same question as here presented, viz., the legislative power to compel expenditure for a local purpose. The question, as stated in the opinion, was whether there rested upon the judiciary the duty, "by the compulsory process of this court, to coerce the city of Detroit into entering in contracts involving a debt for a very large sum for an object of purely local concern, which the legislative body of the city has refused to make." Said the court, through Judge Cooley: "In *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that, when confined, as it should be, to such corporations as agencies of the state, in its government, the proposition is entirely sound. In all matters of legal concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or assist, when called upon, to suppress insurrections, or aid in the enforcement of the police laws. Upon all such ⁵⁵⁵ subjects the

state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for that purpose or through agents or officers of its own appointment. . . . But we also endeavored to show in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, that, though municipal authorities are made use of in the state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed, it would be easy to show that it is not from the standpoint of state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can, for the most part, be very well performed through the employment of the usual township and county organizations; so that if the state alone, in its corporate capacity, were to be regarded, the conferring of special corporate powers on cities and villages might very well be dispensed with. . . . The twofold character of these corporations, as organizations on the one hand for state purposes, and on the other hand for the benefit of the individual corporators, has invariably been recognized by this court wherever there has been occasion to refer to it. We also referred in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, to several decisions in the federal supreme court and elsewhere to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities and as being entitled to exemptions distinct from those which they possess or can claim as conveniences ⁵⁵⁶ in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private, in contradistinction to those in which the state is concerned, and which are called 'public,' thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations. . . . But it cannot be contended that authority in the legislature to determine what shall be the extent of capacity in a city to acquire and hold property is equivalent to or contains within itself the authority to deprive the city of property actually acquired by legislative permission. As to the

property it thus holds for its own private purposes, a city is to be regarded as a constituent in state government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state, as regards such property, is a right of regulation, and, though broader than exists in the case of individuals, is not a right of appropriation. The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large or any portion thereof outside the city limits, are not concerned, the state can no more, by process of taxation, take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to state use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state."

⁵⁵⁷ It may be admitted that the line which distinguishes those matters with respect to which cities, as state agencies, exercise governmental functions from those as to which it acts in its private, corporate capacity, representing the people of the community, is not always well defined. It may well be that, in cases in which it is difficult to ascertain to which class a right, a power, or a function should be assigned, the courts would hesitate to annul an attempted exercise of legislative power. But in cases in which the proper classification can be ascertained the courts should not, and do not, hesitate to act. Upon a question of this kind it is to be expected that under the varying provisions of various state constitutions, and with the different procedures and customs which obtained in the various states at and before the date of the adoption of those constitutions, there should be conflict in the authorities. For example, in some of the cases we have cited the systems devised for police and fire protection seem to have both been regarded as purely municipal and local, and therefore exempt from legislative interference. The better opinion as to police systems seems to be that inasmuch as the state is charged primarily with the preservation of public peace and the protection of life and property in the cities as well as in the rural districts, the city police is, in large measure at least, a part of the state constabulary, and its members perform the functions of state officials in the exercise of delegated state sovereignty. There-

fore, in so far as the police systems of our cities form a part of the state government, they are subject to legislative control. And this control has been distinctly recognized by this court in *Neumeyer v. Krakel*, 110 Ky. 624, 23 Ky. Law Rep. 190, 62 S. W. 518. But between the police systems of municipalities and the fire departments there seems to be a manifest distinction, ⁵⁵⁸ though many of the courts—as in Indiana, Nebraska and California—have recognized the officers of both departments as purely municipal and local. The act in question does not undertake to deprive the local authorities of the power of appointment or selection of the fire commissioners, but only to regulate and fix the salaries of the officers and employes. It seems conceded that the establishment of fire departments by municipalities is a voluntary act of self-protection; that the municipality, on grounds of public policy, is not responsible for negligence of its fire department; and that the property of the fire department is held by the municipalities in their capacity of private corporations. We do not undertake to say that the state is devoid of power to take measures for the protection of the property of its citizens from fire. The question before us is whether the rate of payment of the employes of such a system, devised for the benefit of the local community, of no special interest or advantage to the state, except in so far as it is advantageous and beneficial to the community, is municipal or governmental in its nature. If the rate of pay to be fixed for such employes is governmental, then, also, is the variety of fire-engines to be used, the size and breed of the horses which pull them, the number of fire plugs or cisterns to be established, and the personnel of the force. If the legislature can arbitrarily fix the rate of payment for such services at sixty-five dollars per month, it can fix it at any other sum which it deems reasonable; and if fixing the pay of firemen is a governmental function because firemen render service in the preservation of the property of citizens of the commonwealth, then it is also a governmental function to fix absolutely the per diem of the street sweepers and the monthly wages of the janitors in the city hall. We do not think such legislative ⁵⁵⁹ interference in a matter in which no one but the firemen and the taxpayers of the city can possibly be interested could have been in contemplation of the framers of our constitution, or of the voters who sanctioned its adoption. If such a power is governmental, it is governmental also to fix the wages of every employe of every city, of whatever class. There were cities and

towns before the constitution was adopted. At the date of its adoption they were managing their own little local affairs. They were employing and paying the members of their fire departments, as in times gone by they had managed their own volunteer fire departments. The makers of the organic law—the voters whose ballots operated to enact it—voted for it with these facts before them, and they limited the time which might be devoted to legislation to sixty days in each two years. Is it conceivable that they expected or intended to permit the legislature to take charge of the petty salaries of every hamlet in the state? As said by Judge Olds in *State v. Denny*, 118 Ind. 449, 21 N. E. 282, 4 L. R. A. 65: "It is fair to presume that the people of the state, in the adoption of the constitution, did not intend to surrender the right of local self-government in so far as to allow the legislature to take charge of the fire department of every town and city of the state, and to appoint officers to take charge of and manage the affairs of such department, and limit the legislative body to sixty days every two years. We do not believe that such was the intention of the people at the time, nor do we believe that such is the extent of the power at the present time; nor is there any word or sentence in the constitution granting such power." As said by Judge Cooley: "Some things are too plain to be written. The state has no interest in the property within a city or town, except such indirect interest as it has in ⁵⁰⁰ the property of all its citizens. Since the organization of the state government, towns and cities have universally exercised the exclusive right of self-government in the control and repair of streets, alleys and sidewalks, in the construction of sewers and waterworks, and the organization and control of fire departments. They have been held liable for damages resulting by reason of defects in sidewalks, streets and sewers. All property within its corporate limits is liable for the payment of debts created by the municipality in providing these necessities to the municipality, and in which the people other than those residing within the particular town or city are in no way directly interested." We do not think the legislature can fix the salaries of firemen, any more than it can fix the pay of street sweepers, the drivers of ash carts, or fix the price per square yard which the citizen shall pay for an improvement of the public ways.

The doctrines stated in *McDonald v. City of Louisville* (recently decided), 113 Ky. 425, 24 Ky. Law Rep. 271, 68 S. W. 413, are in full accord with the views here expressed.

For the reasons given, the judgment is reversed, and cause remanded, with directions to sustain the demurrer to the petition, and for further proceedings consistent herewith.

Whole court sitting.

The Legislature has No Power to appoint permanent officers for the full term whose duties are purely municipal: People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103. But see Gooch v. Exeter, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100. That municipal corporations have no vested rights in their offices, charters, or corporate powers, see Commonwealth v. Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801, 49 Atl. 351, 53 L. R. A. 837. As to the power of the legislature to exercise control over the property of municipal corporations, see Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515, and note.

LONG v. ILLINOIS CENTRAL RAILROAD COMPANY.

[113 Ky. 806, 68 S. W. 1095.]

MASTER AND SERVANT—Assumption of Risks.—If a servant proceeds under the order of his master or superior servant in performing an act whereby he is exposed to unusual danger, the master is liable for the resulting injury to the servant, unless the risk of the act was fully realized by the latter, or was so apparent that no man of ordinary prudence, situated as he was, would have undertaken it. (p. 376.)

MASTER AND SERVANT—Risk Assumed Under Superior's Order.—A section hand in obeying the order of his section-boss to ride on a hand-car to his place of work, when both knew that a fast train was overdue, but neither knew its whereabouts, does not assume the risk of injury from a collision therewith, unless the danger was so obvious that a man of ordinary prudence, situated as such servant was, would not have obeyed such order, and this is a question for the jury to determine. (p. 377.)

S. M. Payton, for the appellant.

W. H. Marriott, for the appellee.

⁸⁰⁷ **HOBSON, J.** Appellant filed this suit to recover damages for the loss of life of his intestate by reason of the alleged negligence ⁸⁰⁸ of appellee, and at the conclusion of the evidence on both sides the court instructed the jury peremptorily to find for the defendant, although he had overruled this motion at the close of the plaintiff's testimony. The intestate was a section-hand in the service of appellee, working under a boss whose name was Kron. He had been working for the company about three days at the time of his death, although it would appear

from the proof that he had been in the same service under a previous employment. He was killed on September 10, 1900. On that morning about 6 o'clock the section boss, with his crew of seven men, including the intestate, left the section-house on the hand-car and went to Riney station. They waited there for some time for the passenger train known as No. 104, a fast train from the south, but it was late. An accommodation passenger train, known as No. 32, was due shortly also from the south. Riney is not a telegraph station. The section boss finally concluded that he could safely go to Otter creek, which was about two miles north of Riney, and was under the impression that the local passenger No. 32 would probably arrive before the fast passenger train No. 104. He accordingly ordered his men to get on the hand-car and go to Otter creek. This they proceeded to do, and at each curve they stopped and looked and listened for the train behind them, but saw or heard nothing. After they had made three stops in this way, and when they had emerged from the last curve, and were running down the grade to the Otter creek switch, and not very far from it, one of the men on the car suddenly called out, "There she comes." The train was then emerging from a cut about eight hundred feet from them, and running, according to the proof for the plaintiff, sixty or seventy miles an hour. The hands on the car, except Long, immediately jumped off without standing on the order of their going. About the ~~800~~ time they reached the ground, or before they got up from the fall, the train struck the car. Whether Long did not know of the approach of the train, or realize how close it was to him, is not made clear by the proof. He remained on the car, and was thrown up into the air by the engine as high as the top of the smokestack, and his brains were knocked out. The proof for the plaintiff tended to show that he was so situated that he could not get off as quickly as the others, while that for the defendant showed that the section boss called to him to leave the car. But this was evidently just before the train struck it. He was fifty-four years of age, and was perhaps not as quick in his movements as the younger men. The proof of the plaintiff showed that there were two whistling-boards south of the hand-car, one for a road crossing and one for the station, and that the train did not whistle for either of these. The proof of the defendant showed that the train did whistle, and that it was running between fifty and sixty miles an hour. The schedule time of the train was thirty-five miles. On that morn-

ing there were two sections of No. 104. The train which struck the hand-car was the first section, or an extra consisting of four or five sleepers, carrying excursionists to Ohio, but running on the time of the regular train, and as its first section. It had run from Paducah, one hundred and seventy-five miles, without stopping, and was about twenty-five minutes late. Shortly after it came the second section of No. 104, or the regular fast train, and also the accommodation passenger train, known as No. 32, and they were all three at Otter creek together. It is urged for appellee that the interstate knew the train was late and overdue, and took the risk. It is urged for appellant that he acted under the orders of his foreman, and had a right to presume that his superior would not order him to go ahead with the hand-car if there was danger. The ⁸¹⁰ principle relied on is that the servant may lawfully obey the orders of his employer, relying on his superior knowledge and judgment. But it is insisted that this principle does not apply, as Riney was not a telegraph station, and each of the men on the hand-car knew as much about the danger as the boss. The circuit court seems to have taken this view.

Kron had a watch, and so far as appears was the only man in the crew who had a watch that was running; but they all knew the time of the train, and that it was overdue. None of them knew that there was an extra on the road that morning, but as this was running on the time of the regular train, and was simply the front section of it, it did not materially affect the result. The train men had no intimation of the presence of the hand-car on the track. No flag was put out by Kron, and no torpedoes or anything to give notice of danger ahead. In the American and English Encyclopedia of Law (volume 20, second edition, page 120) the rule is thus stated: "Since the master is under a special duty to inspect and investigate risks to which the servant is exposed, and since the servant may rely upon the performance of this duty, the fact that the servant proceeds under the orders of the master in performing an act whereby he is exposed to unusual danger renders the master liable for a resulting injury to the servant, unless the risk of the act was fully realized by the servant, and was so apparent that no man of ordinary prudence, situated as he was, would have undertaken it." A number of cases are collected sustaining the text: See, also, to same effect, 1 Thompson on Negligence, secs. 192, 442. In section 445, it is said: "Where the negligence of one person has prepared a risk for another, and

that other, proceeding in the discharge of his duty or in the course of his business, accepts the risk, and is hurt ^{§11} in consequence of so doing, the question of whether he is guilty of contributory negligence is almost always a question of fact for the jury." A servant is not called upon to set up his unaided judgment against that of his superiors. He may rely upon their orders: *Ward v. Louisville etc. R. R. Co.*, 23 Ky. Law Rep. 1326, 65 S. W. 2. As has been well said, the servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, and the servant is injured, he may recover unless the work was so obviously dangerous that a servant of ordinary prudence, situated as he was, would not have obeyed.

In this case Long was a mere laborer. The section foreman under whose direction he worked represented the master, and it was Long's duty to obey his orders in the usual course of business. When he received an order it was not his duty to sit in judgment upon its propriety, or to enter into a discussion with him as to the facts upon which it was based. He had a right to presume that improper orders would not be given, and to assume that the section foreman would not direct him to take risks that were improper. If he was injured while obeying the orders of his superior and by reason of his negligence, he may recover, unless the risk was such that a person of ordinary prudence, situated as Long was, would not have taken it. In determining whether Long should have obeyed the orders of his superior, it must be borne in mind that the crew were out on the road, and that if Long had not obeyed he could not have remained with the crew. So far as appears, he knew nothing about the running of the trains, and was not required by his employment to know about them. It was the section boss' duty to control the movements of the crew, and to do this with proper regard to their safety. Long had a right to ^{§12} rely on his superior knowledge and judgment as to the safety of proceeding with the hand-car under the circumstances, unless the facts actually known to Long were such that a servant of ordinary prudence, situated as he was, would not have taken the risk, and this was a question for the jury. In an exhaustive note on this subject to the case of *Dallemand v. Saalfeldt*, 48 L. R. A. 755, the editor, after pointing out the conflict of authority on the question, says: "Some judges, following out the analogy of the doctrine stated in the last section, have held that

the rule by which contributory negligence is inferred, as matter of law, from the undertaking or continuance of work which entails an abnormal risk of which the servant was aware, involves the corollary that the addition of the element of a direct order will not prevent the defense from taking effect if the servant understood the perils to which he would be exposed in obeying that order. . . . But by almost all courts, including those who apply the rule just referred to (see Pennsylvania, Illinois and North Carolina cases cited *infra*), it is held that the fact of the servant's having been directly ordered to do the act which caused the injury introduces into the situation a differentiating circumstance, which will render his contributory negligence a question for the jury in nearly every conceivable state of the evidence. It does not follow that because the servant could justify a disobedience of the order he is guilty of negligence in obeying it. . . . Hence we find it laid down in a leading case that where, in obedience to an order, the servant performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using extraordinary caution or skill, he may recover if ⁸¹² injured. . . . In other cases the same principle is expressed by a restrictive form of statement, the servant being held entitled to obey a specific command of his superior without necessarily incurring the consequences of contributory negligence, unless the execution of that command involves a hazard which no ordinarily prudent person would have subjected himself to." In support of these principles, the following instances are given in which the servant was allowed to recover: Where a section-hand obeys orders to take a hand-car off the track, when a train is close at hand; or where a section-hand undertook to get two stones off the track when a train was approaching; or where a brakeman jumped from a moving train; or where a laborer was injured by the fall of a large wheel which he was helping to move down an incline; or by the caving of a bank; or by the explosion of a blast over which he was ordered to work. These principles control this case. If a gravel train had stopped at Riney that morning, and waited for the passenger until it was past due, and the conductor had then concluded to go on to Otter creek ahead of the passenger train and had ordered the hands aboard it would hardly be maintained that if the train had been run into by the passenger before it reached Otter creek, and one of the laborers killed, the company would

not be responsible. Yet this is, in substance, the case we have; for the section boss has as full control of the hand-car as the conductor has of the gravel train. The hands on the gravel train would not be required to inquire what orders the conductor had, or what emergency induced him to go forward, or what reason he had for supposing it to be safe. All this applies equally to the laborer working under the section boss. Long was simply riding on the hand-car in obedience to the orders of his boss, who was ⁸¹⁴ taking him to the place of work, and for some reason was anxious to get there as quickly as he could.

Judgment reversed, and cause remanded, with directions to grant appellant a new trial.

Whole court sitting.

Du Relle and O'Rear, JJ., dissent.

The Doctrine of the Principal Case will be found discussed in the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884-900, on the right of recovery by employes accepting extrahazardous duties.

AMERICAN NATIONAL BANK v. MOREY.

[113 Ky. 857, 69 S. W. 759.]

BANKS AND BANKING—Wrongful Dishonor of Depositor's Check—Measure of Damages.—In the absence of malice, oppression or bad motive, the wrongful refusal of a bank to honor its depositor's check makes it liable only for compensatory damages and not for punitive damages, or damages for humiliation or mortification of the depositor's feelings. (pp. 382, 383.)

BANKS AND BANKING—Dishonor of Check—Element of Damages.—If a bank wrongfully dishonors its depositor's check, without malice, the fact that such depositor had a nervous chill when her check was protested and returned, cannot be considered in determining the damages due her from such transaction. (p. 383.)

BANKS AND BANKING—Dishonor of Check—Measure of Damages.—If a bank wrongfully dishonors a depositor's check, without malice, the depositor is entitled to recover only compensatory damages for time lost, expenses incurred, loss of business, or other loss sustained by reason of the dishonor of the check. (p. 383.)

Humphrey, Burnett & Humphrey, for the appellants.

R. C. and J. J. Davis, for the appellee

⁸⁵⁹ **HOBSON, J.** On April 4, 1900, Joseph W. Morey deposited with appellant, the American National Bank, \$150 to

the credit of the appellee, Virginia R. Morey, who was his wife. In the latter part of April Morey raised a check given him by Belknap & Co. from \$800 to \$1,800, and drew the money on it from appellant. On May 4th he committed suicide. Appellant settled with Belknap & Co. for the loss. On May 24th appellee deposited with the bank \$72, and this was credited on her pass-book underneath the \$150 which had theretofore been entered on it. In the month of September, 1900, she was in Chicago Illinois, taking lessons with Mrs. Leonide C. Lavaron, with the idea of coming back to Louisville, and doing burnt-wood work. On September 15th, when she had been there one week, and expected to continue a month longer, she gave Mrs. Lavaron a check for \$30 on appellant, to pay for two weeks' lessons and materials bought of her. She had previously drawn two checks for \$25 each, which had been paid. When the \$30 check reached appellant, it indorsed on it, "Has but twelve dollars to her credit," and refused to pay it. The check was returned from Chicago, and, after passing through the hands of the different indorsers, was returned by Mrs. Lavaron to appellant. She was among strangers, had no ^{see} friends in Chicago, was very much mortified, had a nervous chill, and finally had to be taken to her mother in law, at Englewood, Illinois. She telegraphed to Louisville, but appellant persisted in refusing to pay, and finally money was forwarded to her from some relatives in Louisville, with which she paid Mrs. Lavaron, and, as we understand the evidence, returned to Louisville. In November she filed a suit against appellant to recover the balance of her deposit, and also filed this suit to recover damages for the refusal to pay the check of \$30, charging that the statement of the defendant returned with the check was false and malicious, made with the intent to injure the plaintiff; that by reason thereof her credit had been injured, she had been greatly humiliated, and had endured great mental suffering, to her damages in the sum of \$1,000. After the suit to recover the deposit was filed, appellant paid to her the balance due as shown by her pass-book, \$162, and filed answer in the suit for damages, denying the allegations of the petition. That case was tried later, resulting in a verdict and judgment for \$600, to reverse which this appeal is prosecuted.

The reason that the bank did not pay the check was that it conceived the idea that the \$150 deposited to appellee's credit by her husband was his money, and that it had a right to set off against it the \$1,000 it had lost by reason of his rais-

ing the Belknap check. So it charged off the \$150 on her account, and credited it to his account. But it gave her no notice of this, and it manifestly had no right to do so, as far as the proof shows. The court instructed the jury that if at the time the check was presented to the defendant the plaintiff had money in the bank deposited to her credit sufficient to pay the check, and the defendant refused to honor it, then they should find for her such a sum ^{\$61} in damages as would fairly compensate her for any loss or impairment of credit she sustained, and for any humiliation or mortification of her feelings she has been subjected to, by reason of the refusal to honor her check; and if the defendant maliciously refused to honor the check, then, in addition to compensatory damages, they might award such additional sum, by way of punitive damages, as in their discretion they deemed proper. The propriety of these instructions is the chief question on the appeal. In *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 18 Ky. Law Rep. 178, 35 S. W. 911, 32 L. R. A. 568, it was held that if a bank refuses to honor the check of its customer without sufficient justification, he has his action for damages against the bank. Citing *Morse on Banks and Banking*, sec. 458. But in that case the measure of damages was not determined. The authorities are uniform that the relation between the bank and the depositor is that of debtor and creditor. They are equally uniform that when the bank fails to honor the check of its depositor, when he has funds with it sufficient to pay the check, a right of action accrues at once, and that the recovery is not to be limited to nominal damages. Mr. Bishop says the banker for this may be sued in tort, though the wrong is believed to be without name: *Bishop on Noncontract Law*, sec. 491. In 5 *American and English Encyclopedia of Law*, page 1060, the rule as to the measure of damages is thus stated: "The depositor, by proving special loss, is always entitled to recover substantial damages. But if unable to show any special loss or injury, the better opinion seems to be that he would still be entitled to recover such moderate damages as the jury should judge to be a fair and reasonable compensation for the injury which he must have sustained, for it is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of ^{\$62} the injury being within the peculiar province of the jury to determine." This is taken from the language of Lord Campbell, C. J., in *Rolin v. Stewart*, 14 Com. B. 595, and seems to be supported by the later cases in

England and in this country. In *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632, a judgment for \$300 for dishonoring a check was affirmed. The trial court charged the jury that the plaintiff was entitled to recover substantial damages, and that they might find punitive damages, "if under all the circumstances in the case, the defendant unnecessarily and unreasonably acted in disregard of the rights of plaintiff, and with partiality against him." The court said: "A bank is an institution of a quasi public character. It is chartered by the government for the purpose, inter alia, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositors' checks upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time, the business of the community would be at the mercy of banks if they could at their pleasure refuse to honor the depositors' checks, and then claim that such action was a mere breach of an ordinary contract, for which only nominal damages could be recovered, unless special damages were proved. There is something more than a breach of contract in such cases; there is a question of public policy involved, as we said in *First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages. In this case the jury do not appear to have given more; they evidently did not award punitive damages." In *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917, 15 L. R. A. 134, a judgment ⁸⁶³ for \$450 damages was affirmed, where the dishonor of the checks was due to a mistake of the bookkeeper in charging the checks of another customer to the account. It was held that there was no evidence of malice, and there seems from the report of the case to have been little proof of special damage. The court laid down as the proper measure of damages a reasonable compensation for the injury the customer must have received from the dishonoring of his checks. In *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190, when Goos' check was dishonored, he was arrested and placed in prison, and newspapers were printed and sold on the streets, publishing the fact. The court reversed a verdict for the plaintiff, on the ground that the proper measure of damages was not given the jury. It held that there could be no punitive damages, that his arrest and imprisonment could not be considered, and that he could only

recover such temperate damages as would be a reasonable compensation for the dishonor of the check. Substantially the same rule was laid down in *Svendsen v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 65 N. W. 1086, 31 L. R. A. 552; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 80 Am. St. Rep. 857, 58 S. W. 261, 51 L. R. A. 255; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190. There was some evidence as to loss of credit, and aside from this, the instruction so far as it submitted this as an element of damage, was correct. But there was nothing in the case to indicate actual malice, oppression, or bad motive on the part of the bank and no instruction should have been given as to punitive damages. None of the cases allow a recovery for humiliation or mortification of feeling where compensatory damages only are allowed, and the instruction of the court, in so far as it allowed a recovery for this, was improper. The fact that the plaintiff ⁸⁶⁴ had a nervous chill when the check was protested and returned to her and had to be taken to her mother in law's, was immaterial, as the nervous chill was not the natural result of the protest of the check, or such a thing as should reasonably have been anticipated from persons of ordinary health and strength. On the contrary, the plaintiff may recover for any time she lost, or any expenses she incurred, or for any loss of business or instruction that she sustained, by reason of the dishonor of the check. Her pleading does not appear to have been drawn under the view of the law we have indicated, and on the return of the case she may have leave to amend her petition, and set out her damages specially, if she desires to do so: *Robinson v. Western Union Tel. Co.*, 24 Ky. Law Rep. 452, 68 S. W. 656. The action rests upon the ground that the bank is charged by law with certain duties, and that for a breach of these duties it is liable to the party injured for the damages done him. The measure of these damages is the same as in the case of the breach of other duties imposed by law.

Judgment reversed, and cause remanded for a new trial.

The Recovery of Damages, special and compensatory, for the failure of a bank to honor a check, is discussed in the monographic note to *J. M. James Co. v. Bank*, 80 Am. St. Rep. 865-875.

CASES

IN THE

SUPREME COURT

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MINNESOTA.

KLUGHERZ v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[90 Minn. 17, 95 N. W. 586.]

NEGLIGENCE—Dangerous Premises.—By a Mere Licensee is meant one who has the tacit permission or privilege of entering upon the premises of another, but without invitation, express or implied; under such circumstances a person enters at his own risk, and must take the premises in the condition in which he finds them. (p. 386.)

NEGLIGENCE—Dangerous Premises.—If One Invites another, either expressly or by implication, to go upon his premises, there arises the obligation to use ordinary care that the visitor shall not be injured. (p. 386.)

RAILWAY DEPOT—Duty to Persons There Near Train Time.—While a railway company cannot be expected to be continuously on its guard as against loiterers and trespassers, yet it should anticipate that its station-house and depot grounds may be used as a place of meeting by people for various lawful purposes at or about the time of the arrival and departure of trains. (p. 388.)

RAILWAY DEPOT—Duty to Persons There—Time as Affecting.—The time, in respect to the arrival of trains, at which a person visits a depot is to be taken into consideration in determining the duty owed him by the railway company. But it is not possible to lay down a general rule as to the limit of time under all conditions within which one shall be restricted to visit such premises at his peril; it is a question of fact to be determined according to the circumstances of each particular case. (p. 389.)

RAILWAY STATION—Duty to Persons Meeting There.—As toward one who goes to a depot an hour and ten minutes before train time in good faith to meet a person on a matter of business who, he believes, will take the train, the railway company, in unloading a gravel train near by, owes the duty of ordinary care. (p. 389.)

RAILWAY—Breaking of Cable in Unloading Gravel Train.—In an action against a railway company for injuries sustained by a person, while standing near a depot, through the breaking from its

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stay ropes of a cable used in unloading a gravel train, evidence of the manner of starting the engine and of the character of the ropes is admissible. (p. 390.)

Pfau & Pfau and H. H. Field, for the appellant.

Young & Lossow, for the respondent.

¹⁸ LEWIS, J. Appellant company was engaged in filling a hole on the northerly side of its depot in the city of Mankato, and for such purpose had constructed a temporary track upon which it ran a gravel train and unloaded the gravel by means of a plow. The track at this point was upon a curve, and the plow was placed on the northerly end of the gravel train, one end of a long steel wire cable was attached to the plow, and the other end was fastened to a locomotive at the southerly end of the train, and because of the curvature of the track it was necessary to fasten the cable over the middle of the cars so that the plow would follow them. The cable was kept in place by means of pulleys ¹⁹ some distance apart, fastened with ropes to the side of the cars upon the outer arc of the circle, and the cable passed through these pulleys. A straight line drawn from the plow to the locomotive touched the outhouse and the corner of the depot.

About 4 o'clock in the afternoon, respondent, a boy of fourteen years, was standing in the depot grounds at a point about one-third of the distance between the corner of the depot and the outhouse, which was about twenty feet from the depot. The locomotive was started in motion to begin the process of plowing the gravel from the cars, when, at a point nearly opposite the depot, one of the ropes broke, releasing the cable, which, with the action of the engine, violently straightened, struck the corner of the depot and the outhouse, and also respondent, causing him serious injury. Respondent secured a verdict in the court below, and this appeal involves the question whether, under the circumstances, appellant was called upon to exercise ordinary care; also the correctness of certain rulings of the court.

The liability of the company turned upon the nature of the relation existing between it and respondent at the time of the accident. If respondent was a trespasser upon appellant's property, then it owed him no duty except to refrain from those acts commonly denominated "willful," but there is no claim in this case that any such degree of purpose was manifest. It is claimed that under the great trend of authorities, if respond-

ent was upon the premises as a mere licensee, appellant owed him no greater degree of care than if he had been a trespasser.

By a "mere licensee" is meant the tacit permission or privilege which a person has of entering upon the premises of another, but without any invitation, express or implied. Under such circumstances a person enters at his own risk, and, the owner having assumed no responsibility in respect to the conduct or care of such trespasser or licensee, must take the premises in the condition in which he finds them. But where the owner, either expressly or by implication, invites a person to go upon his premises, there arises at once the obligation to use ordinary care to see that the person thus invited shall not be injured. This duty arises from the nature of the contract. It is reasonable for the person invited to assume that the owner will use ordinary prudence to protect him while acting in pursuance of the invitation.

²⁰ No great difficulty has arisen in applying this principle to private parties, but there has been much discussion, and some difference of opinion, with reference to the obligations of public and quasi public corporations as to persons in and around their premises, such as station-houses and depot grounds. It is generally claimed by such corporations that station-houses and depot grounds are primarily their properties, to be used for their purposes, and that the public has no rights connected therewith except in the transaction of business with the owners. There has been a difference of opinion as to what constitutes such business. It will not be disputed that the public has the right to enter stations, and, so far as reasonably necessary, depot grounds, for the purpose of taking trains and alighting from them, and making inquiries at the offices of the depot during business hours for the purpose of obtaining information and transacting business with the officers or agents in charge; but some courts have limited to a very narrow compass the time within which a passenger may enter such premises for the purpose of awaiting the arrival of trains: *Pennsylvania R. Co. v. Martin*, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361.

Controversy has often arisen where a party injured had, or claimed to have, some business relations directly with the company, and the question at issue was whether, under the circumstances existing at the particular time, the company was under obligations to exercise ordinary care for his protection. It has been held that where a person entered a railroad station in the evening to take a train, and, after finding that the last one had

gone, remained there for his own convenience for some time during which the station master put out the lights at the usual closing time, the company was not liable for injuries to such person received while stepping off the platform in the dark: *Heinlein v. Boston etc. R. R.*, 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698. The decision is based upon the principle that the railroad company had business hours within which it kept the station open and lighted for the benefit of the public, and that its rules and hours for doing business must be complied with. To the same effect, see *Cincinnati etc. R. R. Co. v. Aller*, 64 Ohio St. 183, 60 N. E. 205, and *Dowd v. Chicago etc. Ry. Co.*, 84 Wis. 105, 36 Am. St. Rep. 917, 54 N. W. 24, 20 L. R. A. 527. But that rule does not govern the case before us.

The case now under consideration is also distinguished from those cases where a railroad company has permitted the public to acquire by ²¹ user certain rights or privileges, as, for instance, a crossing over some part of its grounds or track. Under such circumstances it has been held that the company will be required to exercise the same degree of care as applicable to other streets or crossings: *Davis v. Chicago etc. Ry.*, 58 Wis. 646, 46 Am. Rep. 667, 17 N. W. 406; *Harriman v. Pittsburgh etc. R. R. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

It is claimed by respondent that the case is governed by *In-galls v. Adams Exp. Co.*, 44 Minn. 128, 46 N. W. 325, where it was held that a police officer of Austin, Minnesota, was entitled to recover for injuries received by the negligent running of an overloaded truck on the platform of the railway company; but in that case the accident occurred at or about the time of the arrival or departure of a train, and the officer was in the exercise of his duty at the time, and had a right to be there. It must be conceded that railroad companies have a right to determine what are reasonable business hours during which the public is permitted to transact business with them, and that they may limit the use of their premises to certain definite periods of time; but we are not prepared to say that, as a matter of law, such companies do not, under any circumstances, owe the duty of ordinary care to persons having occasion to visit a depot for the purpose of meeting some one expected to be there at a certain time, even though neither party has business relations with the company.

In this case the young man stated that he went to the station to meet a Mr. Bates on a matter of business; that he expected

him to be there about train time for the purpose of boarding the train; but when respondent went to the premises it was about an hour and ten minutes before the time of departure of the train, of which fact he was aware. It may be inferred that he went so early in anticipation of meeting the man there, or in that vicinity, in time to find him and have a consultation before his departure.

We are unable to see why the duty of the railroad company to the public should be confined to those having strictly business relations with the company. There is no reasonable distinction between the rights of a person visiting the premises for the purpose of escorting another to a departing train, and the rights of one who goes there for the purpose of talking with a departing person on a business matter. There is a wide difference between the use of the premises with such ²² motives and those of idle curiosity and merely to kill time. While the company cannot be expected to be continuously on its guard as against loiterers and trespassers, yet it is reasonable that it should anticipate that the station-house and depot grounds may be used as a place of meeting by people for various lawful purposes at or about the time of the arrival and departure of trains.

The dangers connected with the unloading of the gravel train were not apparent to a casual observer who might be in the vicinity—the unloading operations were not conducted upon the premises, although contiguous thereto. The method of fastening the cable by means of pulleys and ropes, and the manner of operating the plow by an engine, were dangerous proceedings. It must have been evident to those in charge of the work that if the stay ropes gave way the cable would instantly sweep across the intervening space between the cars and the depot, and this space was outside of the system of tracks. There has been much discussion in the books, and fine distinctions have been drawn, between active and passive negligence and acts of commission and omission. There is a marked difference between acts of negligence attributed to the condition of the premises, or arising from acts committed thereon, and conditions arising outside of the premises. On the one hand, a visitor to the depot grounds may reasonably be expected to assume the condition as he finds it, for it is open to his observation; on the other hand, there may be nothing to put him upon his guard, and it would seem unreasonable to require even a licensee to assume the risk of meeting with such unlooked for occurrences.

What the result might be if the respondent was a licensee, it is not now necessary to determine, for we are not prepared to hold, as a matter of law, that he was either a trespasser or a mere licensee. Nor do the facts, taken most favorably for respondent, require, as a matter of law, the conclusion that he was upon the premises by invitation, expressed or implied, and that appellant owed him the duty of ordinary care. It is not possible to lay down a general rule as to the limit of time under all conditions within which a person shall be restricted to visit such premises at his own peril. It is a question of fact, and must be determined according to the circumstances of each particular case. The line should not be too closely drawn, and under the facts and circumstances of this case we think it was a question for the ²³ jury to determine whether the respondent was acting in good faith and in the reasonable expectation of meeting a person to be there for a lawful purpose. In determining that question, the time respondent went to the depot in advance of the train time is to be taken into consideration, but the fact that he was there an hour and ten minutes ahead of time is not necessarily decisive. If he was there with such intention, appellant owed him the duty of exercising ordinary care in conducting the unloading operations in the vicinity. Whether it did exercise such care by the use of proper stay ropes, or by keeping a reasonable lookout to guard persons against the danger, were questions for the jury.

The court instructed the jury that if respondent was upon the premises for the lawful purpose of seeing Mr. Bates, whom he supposed was going to take the train an hour or so after the time he went there, appellant owed him the duty of ordinary care; and to the same effect if he was there for a lawful and legitimate purpose, near the time when a train was about to arrive or depart, for the purpose of seeing a person whom he supposed was going away on the train, then the company owed the same duty. This was error, as it took from the jury consideration of the element of time. As above stated, the time he was there should be considered in connection with all the circumstances. For this reason a new trial must be granted.

There was no error in receiving testimony with reference to the circumstances under which respondent went to the depot, and his expectation of meeting Mr. Bates. It was also proper for the court to receive evidence as to how the accident occurred, including the manner in which the engine was started. The gist of the act of negligence was the insufficient fastening of

the cable, but in determining that question it was competent to consider the manner in which the engine was started. It was also proper to receive evidence in regard to the character of the rope and its suitability for such use. We find no other error in the charge of the court.

Order reversed, and new trial granted.

It is the Duty of a Railway company to keep its station-house, or depot, in a comfortable, safe, and proper condition: St. Louis etc. Ry. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661; Jordan v. New York etc. R. R. Co., 165 Mass. 346, 52 Am. St. Rep. 522, 43 N. E. 111, 32 L. R. A. 101; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587. It has been held, however, that one who goes there at night after business hours assumes the risk of the premises being unsafe: Sullivan v. Minneapolis etc. Ry. Co., 90 Minn. 390, post, p. 414, 97 N. W. 114. And it has also been held that a railway company may insist that such of its patrons as contemplate taking a morning train shall, if they desire to sleep, find quarters other than its waiting-room: Central of Georgia Ry. Co. v. Motes, 117 Ga. 923, 97 Am. St. Rep. 223, 43 S. E. 990.

BEEDE v. WISCONSIN CENTRAL RAILWAY COMPANY.

[90 Minn. 36, 95 N. W. 454.]

CONNECTING CARRIERS—Presumption of Negligence.—If apples, shipped over connecting railroads, were in good condition when accepted by the first carrier but damaged by frost when delivered by the last carrier, the burden is on it to show that the loss did not result from any cause for which it was responsible, although the apples were transported in through sealed cars. (p. 392.)

Edmund A. Prendergast and Thomas H. Gill, for the appellant.

George H. Stiles, for the respondent.

³⁷ **START, C. J.** Action to recover damages which the plaintiff sustained by the alleged negligence of the defendant, as a common carrier, in the transportation of two carloads of apples. At the close of the evidence the defendant requested the trial court to direct a verdict in its favor. The motion was denied, and the cause submitted to the jury, and a verdict returned in favor of the plaintiff. The defendant appealed from an order denying its motion for judgment or a new trial.

The principal question on this appeal is whether the verdict is sustained by the evidence. The facts were stipulated by the

parties, except certain facts to which an expert testified. The facts, as stipulated, were, in effect, these: The plaintiff shipped from Plymouth, New Hampshire, two carloads of apples, consigned to himself at St. Paul. The apples were in good condition when delivered to the initial carrier, and were placed in refrigerator-cars, and forwarded at owner's risk of freezing, and arrived at their destination with the seal to the cars intact. When the apples were delivered to the plaintiff at St. Paul by the defendant, the last carrier, they had been injured by frost, and the plaintiff was damaged thereby in the sum of two hundred and thirty-six dollars and twenty-five cents, for which sum, with interest, it was stipulated he should have judgment in this case, if entitled to recover. The cars reached Lancaster, New Hampshire, December 9, 1900, and remained there some nineteen hours. During this time the thermometer ranged from six to sixteen degrees below zero. It does not appear whether anything was done to protect the apples from frost while the cars were at Lancaster. The cars came into the possession of the defendant at Manitowoc on December ²⁹ 15th, and were forwarded over its line on the first train leaving after their arrival. In the meantime they stood upon the sidetrack of the defendant seventeen hours without any protection from the elements, during which time the thermometer ranged from eight to seventeen degrees below freezing point. There was also testimony by an expert in handling and transporting fruit to the effect that apples, if kept in motion, could be transported in refrigerator-cars without freezing when the thermometer ranged from zero to fifteen degrees below. He also expressed an opinion to the effect that, if the apples were sidetracked and remained without any protection for seventeen hours, they would become frosted, with the thermometer standing from eight to seventeen degrees below freezing point.

It is the claim of the defendant that it conclusively appears from the evidence that the apples were frozen before they came to the possession of the defendant. It may be conceded that the evidence would sustain a verdict to that effect, but we are of the opinion that the verdict against the defendant is not so decidedly against the preponderance of the evidence as to justify us in interfering with it. The apples were in good condition when accepted by the first carrier, and damaged by frost when delivered to the consignee by the defendant, the last carrier; hence the burden was on it to show that the loss did not result from any cause for which it was responsible: *Shriver v. Sioux*

City etc. Ry. Co., 24 Minn. 506, 31 Am. Rep. 353; *Shea v. Minneapolis etc. M. Ry. Co.*, 63 Minn. 228, 65 N. W. 458. This rule is not modified, as defendant claims, by the fact that the apples were transported in through sealed cars: *Leo v. St. Paul etc. Ry. Co.*, 30 Minn. 438, 15 N. W. 872.

The defendant sought to show that it was not responsible for the loss by showing that the weather was colder while the apples were in the hands of the initial and intermediate carriers than it was while the defendant had control of them, and that for nineteen hours the cars were detained at Lancaster when the weather was severely cold. It cannot, however, be presumed, in the absence of evidence, that no measures were taken to protect the apples from frost during this delay. The evidence was not conclusive that the apples were in the same condition when they came to the hands of the defendant as they were when it delivered them to the plaintiff, for the inference to be drawn³⁰ from the admitted facts was one of fact for the jury. There were no prejudicial errors in the charge of the court. It is clear from the whole charge that the court did not intend to submit to the jury any claim on the part of the plaintiff for damages by reason of the delay of the cars at Manitowoc. What was said in this respect was technically inaccurate, but could not, in our opinion, have misled the jury. If defendant believed otherwise, it should have called the attention of the court to the matter: *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754.

Order affirmed.

**BURDEN OF PROOF AS BETWEEN CONNECTING CARRIERS
TO SHOW WHO IS AT FAULT FOR LOSS OF INJURY.**

- I. First or Initial Carrier, 392.**
- II. Intermediate Carriers, 394.**
- III. Last or Terminal Carrier.**
 - a. In Case of Damage to Goods, 394.**
 - b. Of Loss of Goods, 396.**
 - c. Particular Kinds of Goods—Baggage, 397.**
 - d. Goods Delivered by Expressmen, 397.**
 - e. Shipments in Through Sealed Cars, 398.**
- IV. Rebuttal of Presumptions, 399.**

I. First or Initial Carrier.

Where goods are received in good condition by a carrier for shipment, and in the course of their transportation they pass through the hands and over the lines of connecting carriers, there is no presumption, if they are delivered by the last carrier in a damaged condition, that the injury occurred while the goods were in the hands

of the first carrier: *Farmington Mercantile Co. v. Chicago etc. R. R. Co.*, 166 Mass. 154, 44 N. E. 131. It would seem, too, that the same rule is applicable where a part of the goods are lost during their transportation, so that only a partial delivery can be made by the last carrier; for when a part of a shipment is lost, the loss is in the nature of damage to the goods: See *Gwyn Harper Mfg. Co. v. Carolina Cent. R. R.*, 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894, *American Exp. Co. v. Second Nat. Bank*, 69 Pa. St. 394, 8 Am. Rep. 268. But where there is a total loss, or the freight or baggage, as the case may be, does not reach its destination, the first carrier is prima facie liable for the loss: *Ohio etc. R. R. Co. v. Emrich*, 24 Ill. App. 245; *International etc. Ry. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541; *Brintnall v. Saratoga etc. R. R. Co.*, 32 Vt. 665.

To quote from the opinion of Justice McClelland in *Louisville etc. R. R. Co. v. Jones*, 100 Ala. 263, 14 South. 114: "Where goods are delivered to a common carrier for transportation to a point beyond its own lines under a through bill of lading, which, however, contains a stipulation exempting the receiving carrier from liability from loss or damage occurring beyond its own terminal, and the goods are not delivered to the consignee at all, the presumption of law is that they were lost by the receiving carrier, and he will be liable unless he can show that the consignment was safely delivered to the connecting carrier; the burden is on him in such case, and plaintiff having shown nondelivery by the discharging carrier is entitled to recover without more: *Georgia Pac. Ry. Co. v. Hughart*, 90 Ala. 36, 8 South. 62.

"On the other hand, where upon such shipment and bill of lading the goods have been delivered by the connecting or final carrier to the consignee, or have been carried to the place of consignment for delivery, and are then in a damaged condition, the presumption of law is that they were delivered by the receiving to the connecting carrier in good condition, and that the damage occurred while they were in the possession of the delivering carrier; and, therefore, in an action against the receiving carrier for damages occasioned, not by the loss, destruction, or nondelivery of the property, but by the injuries inflicted upon it at some time before delivery to the consignee, the presumption of safe delivery by the first to the second carrier must be overcome by evidence that the damage occurred before the shipment passed out of the possession of the first carrier; the burden in this latter case is upon the plaintiff, and unless he discharges it, he fails to make out his cause of action and must be cast. The presumption of law being that the delivering carrier has damaged the property, in an action by the owner against him, the plaintiff need only prove the shipment in good condition and the delivery in damaged condition: *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Cooper v. Georgia Pac. Ry. Co.*, 92 Ala. 329, 25 Am. St. Rep. 59, 9 South. 159."

In an action against the initial carrier for damages, the plaintiff must rebut the presumption that the goods were injured while they were in the hands of the terminal carrier. This being done, it devolves on the intermediate carrier to show its freedom from responsibility; and this being shown, the burden is on the first carrier to overcome the presumption of negligence which arises from the circumstances: *Fort Worth etc. Ry. Co. v. Shanley* (Tex. Civ. App.), 81 S. W. 1014. It is not error to refuse to enter judgment against the first carrier, for the reason that it fails to show that the injury did not occur on its line, where there is no evidence that such was the case: *St. Louis etc. Ry. Co. v. Cohen* (Tex. Civ. App.), 55 S. W. 1123. This, however, is anticipatory of presumptions against intermediate and terminal carriers.

II. Intermediate Carriers.

It is said that among connecting carriers that one in whose hands goods are found injured is presumed to have caused the damage, and the burden is upon it to rebut the presumption: *Morgantown Mfg. Co. v. Ohio etc. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679, 28 S. E. 474; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348. In case such carrier is an intermediate carrier, neither the first nor the last of connecting lines, this presumption would seem to attach to it: See *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544. But when property, in this case baggage, is in good condition when delivered to an intermediate road, and damaged when delivered at its destination, it does not devolve on the intermediate road to show that it was in good condition when delivered to the terminal road: *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483. If, however, baggage does not reach its destination, the burden is on an intermediate carrier into whose hands the baggage came to show a safe delivery thereof to the next carrier: *Philadelphia etc. R. R. Co. v. Harper*, 29 Md. 330.

III. Last or Terminal Carrier.

a. *In Case of Damage to Goods.*—If goods were received in good condition by the first or any intermediate carrier of a connecting line, the last or terminal carrier of the line is presumed to have received them in that condition; and if they are damaged when they reach the place of consignment, the burden is on the last carrier, in an action against it for damages, to show that the injury did not occur while the goods were in its hands: *Evans v. Atlanta etc. R. R. Co.*, 56 Ga. 498; *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Central R. R. etc. Co. v. Bayer*, 91 Ga. 115, 16 S. E. 953; *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538; *Memphis etc. R. R. Co. v. Holloway*, 9 Bart. 188; *Louisville etc. R. R. Co. v. Tennessee Brewing Co.*, 96 Tenn. 677, 86 S. W. 392; *Texas etc. Ry. Co. v. Adams*, 78 Tex. 372, 22 Am. St.

Rep. 56, 14 S. W. 666; *Houston etc. R. R. Co. v. Ney* (Tex. Civ. App.), 58 S. W. 43; *Gulf etc. Ry. Co. v. Cushney*, 95 Tex. 309, 67 S. W. 77. Compare *Marquette etc. R. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 7 N. W. 209. But to raise this presumption, it must be shown that the goods were delivered in good condition to the first carrier: *Lake Erie etc. Ry. Co. v. Oakes*, 11 Ill. App. 489; and that the loss occurred while the car was in transitu: *Cooper v. Georgia Pac. Ry. Co.*, 92 Ala. 329, 25 Am. St. Rep. 59, 9 South. 159.

"The rule is," says Justice Lewis in *Gulf etc. Ry. Co. v. Jones*, 1 Ind. Tex. 354, 37 S. W. 208, "when property is delivered to a railroad company to be transported by that and other companies over their respective roads to its place of destination, it is enough for the owner, in an action against the company delivering the property to recover damages for negligence, to show that he delivered the property to the first carrier in good order; and the burden is then cast upon the company delivering the goods thus injured of proving that they were not injured while in its possession, or that they came to its possession thus injured."

This presumption is not removed by a statute which makes the initial carrier liable in every case for loss or damage to goods, allowing it, however, to discharge itself by the production of a written receipt from the next carrier to which it properly delivered the goods: *Willett v. Southern Ry.*, 66 S. C. 477, 45 S. E. 93.

Concerning the reason and policy of this doctrine, Justice Woods in the above South Carolina case has this to say: "The general rule is, that the burden is on the carrier which delivers the goods to the consignee to respond to any damage which occurs in transit, or show that it was done while in the hands of some other carrier. . . . 'In an action against the last carrier, if it is shown that the goods were delivered to the first carrier in good order, this condition, in the absence of a contrary showing, will be presumed to continue until the goods came into the possession of the last carrier, and that the injury occurred on that line. This is on the principle that things once proved to have existed in a certain condition are presumed to have continued in that condition until the contrary is established by evidence.' We think this doctrine is supported by public policy so important as to amount to necessity. With the immense traffic and the resulting complicated methods of modern American railroads, and the connection of these roads with one another, to impose upon the owner of property passing over connecting lines the burden of making affirmative proof that the loss occurred on a certain one of these lines, would be practically relieving of liability railroads handling freight as connecting lines; for the owner could rarely make the required proof, and when he could make it, in most instances the expense of doing so would be greater than the value of the goods. The rule works no hardship to the railroads as common carriers, because they receipt to one another

and can easily trace loss or damage." To the same effect see the opinion of Justice Johnson in *Smith v. New York Cent. R. R. Co.*, 43 Barb. 225, affirmed in 41 N. Y. 620.

"This is the only rule," observes Justice Thompson in *Flynn v. St. Louis etc. Ry. Co.*, 43 Mo. App. 424, "which offers any protection to the shipper, except in cases where the goods are lost in a fire, shipwreck, railway accident, or in some catastrophe of a public nature. Where, as in a case like the present, the goods are committed to the initial carrier, and placed in a car on the road of such carrier, and the car is sealed and thus hauled through over the connecting roads to its final destination, and the goods are found broken at the terminus, the shipper can seldom or never, from the nature of the case, find out and prove what negligence in drawing the train, or in shunting or switching the car, or in shunting other cars against it, may have produced the injury. The rule above invoked would leave him absolutely helpless and without remedy in nearly all cases. . . . No presumption of negligence can attach to either carrier, except the last, in the absence of evidence that neither of such carriers delivered the goods to its connecting carrier in a damaged condition; as to them the presumption of right acting exonerates them. But this presumption of right acting is repelled, as to the terminal carrier, by the fact of the goods having been delivered to him in a damaged condition. The means of knowledge are within his power, but not ordinarily within the power of the shipper, and he may protect himself, if blameless, by showing that the goods came into his hands in the same condition in which he delivered them; and thus the responsibility may be shifted backward from one carrier to another, until it is fastened upon the one who is really to blame. They, in undertaking for their gain as well as for the public advantage, to make and execute through contracts of shipment, have the power of fixing the responsibility where it belongs, and of adjusting the loss among themselves. The shipper has no such power."

b. *Of Loss of Goods.*—Where goods were delivered in good condition to the initial carrier, for shipment, but only a part of the consignment reaches its destination, the presumption is that the goods reached the terminal carrier in the same good condition in which they were delivered to the initial carrier, and that the loss is due to the fault of the terminal carrier. The same rules that govern in the case of damaged goods are applicable here: *Southern Express Co. v. Hess*, 53 Ala. 19; *Savannah etc. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544; *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577, 13 South. 37; *Gynn Harper Mfg. Co. v. Carolina Cent. R. R. Co.*, 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894; *Laughlin v. Chicago etc. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493. But where the loss is total, and it does not appear that the freight or baggage ever came into the hands of the terminal carrier,

the rule is otherwise, and the final carrier is not liable, unless a joint contract, partnership, or ratification is shown: *McDowell v. Joice*, 46 Ill. App. 625; *Romero v. McKernan* (App. Div.), 88 N. Y. Supp. 365; *Church v. Atchison etc. R. R. Co.*, 1 Okla. 44, 29 Pac. 530; *Texas etc. R. R. Co. v. Berry*, 31 Tex. Civ. App. 3, 71 S. W. 326.

c. Particular Kinds of Goods—Baggage.—Perishable goods, such as butter and melons, shipped in good order, are presumed to reach the terminal carrier in like good order; and if they are in a damaged condition when they reach their destination, the burden is on the last carrier to show that they were not in good condition when delivered to it: *Forrester v. Georgia R. R. etc.*, 92 Ga. 699, 19 S. E. 811; *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280. A prima facie case is made out against the terminal carrier when fruit is shipped in good condition and received by the consignee in bad condition: *Missouri etc. Ry. Co. v. Mazze*, 29 Tex. Civ. App. 295, 68 S. W. 56. See, too, the principal case, ante, p. 390.

The same doctrine applies to shipments of livestock: *Paramore v. Western R. R. Co.*, 53 Ga. 383; *Texas etc. Ry. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331.

Where baggage is delivered to a carrier in good condition and is checked through to its destination, the passage being over several connecting roads, and at the end of the journey the baggage is found to be injured, the presumption is that the injury occurred while it was in the control of the last carrier, and the burden is on it to explain that the loss was otherwise: *Moore v. New York etc. R. R. Co.*, 173 Mass. 335, 73 Am. St. Rep. 298, 53 N. E. 816; *Strong v. Long Island R. R. Co.*, 86 N. Y. Supp. 911, 91 App. Div. 442; monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 363. As is said in *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483: "From the necessities of trade and commerce, or of successful competition, or from other causes, it has become common to establish long routes of transportation by successive and connecting roads. Under such circumstances, it would generally be difficult and oftentimes impossible, for the owner to show on which road they were injured. One of the roads is certainly responsible; and the last carrier has the means of showing the condition of the goods when received by him. The safety and protection of the commercial and traveling public require the recognition of the presumption, in the absence of evidence, that the goods continued in the same condition as when received by the first carrier, unless it may be exceptional goods of a perishable nature, and casts on the discharging carrier, who delivers them in a damaged condition, the burden of showing their condition when received by him."

d. Goods Delivered by Expressmen.—The question has arisen as to whether an expressman who delivers goods to a railroad company

for shipment over its line and through other carriers is a connecting carrier within the meaning of the rules above considered. In *Willett v. Southern Ry.*, 66 S. C. 477, 45 S. E. 93, the plaintiff delivered an ornamental camphor wood chest to an expressman at Port Chester, New York, marked for Aiken, South Carolina. The chest was delivered to plaintiff at Aiken in a damaged condition, with the crate shattered. Action for the damages was brought against the last carrier having it in charge. The court said: "The next question is, Was the expressman to whom the chest was delivered a connecting common carrier in such a sense that delivery to him of the chest in good condition raises the presumption that it was delivered to the railroad at Port Chester in good condition? It is a matter of common knowledge that when one speaks of an expressman in a city, he usually means an agent of one of the local express companies whose business is to transport goods for all persons who offer them. Such companies are common carriers: *Piedmont Co. v. Columbus etc. R. R. Co.*, 19 S. C. 365; *Jackson Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; and when railroad companies receive freight for shipment, as in this case, just as they receive it from other railroads, we are unable to see the force of the position that it is not to be regarded as a connecting carrier. . . . We hold, therefore, that the presumption is that the chest was delivered to the railroad company at Port Chester in good condition, and the presumption that it was damaged by the last carrier stands, in the absence of any proof to the contrary."

But where a drayman delivers a trunk to the initial carrier, and another drayman delivers it to the owner at his destination, where it is discovered that part of the contents are missing, the trunk bearing no indication of having been tampered with, it is held in *Ringwalt v. Wabash R. R. Co.*, 45 Neb. 760, 64 N. W. 217, that until some evidence is introduced showing that the trunk was not opened or tampered with while in the possession of the draymen, the presumption will not arise that the goods were lost while in the possession of any of the connecting lines of railroads over which it had been transported.

e. Shipments in Through Sealed Cars.—The rule that when goods were received in good condition by the first carrier, but are damaged when delivered to the consignee by the final carrier, the burden is on it to show that the loss did not result from any cause for which it was responsible, is not modified by the fact that the goods were shipped in through sealed cars. This is the holding of the principal case, ante p. 390. See, also, *Central R. R. v. Rogers*, 66 Ga. 251; *Cote v. New York etc. R. R. Co.*, 182 Mass. 290, 94 Am. St. Rep. 656, 65 N. E. 400; *Leo v. St. Louis etc. Ry. Co.*, 30 Minn. 438, 15 N. W. 872; *Faison v. Alabama etc. Ry. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577, 13 South. 37; *Flynn v. St. Louis etc. Ry. Co.*, 43 Mo. App. 424.

IV. Rebuttal of Presumptions.

The presumption of negligence against connecting carriers under certain circumstances, which has engaged our attention in the foregoing pages, is, of course, not conclusive. The initial carrier, as to a consignment that never reaches its destination, may shift responsibility by showing that it delivered the goods to its connecting line; and the terminal carrier, as to goods that it delivers at their destination in a damaged condition may shift responsibility by making proof that it received them in a damaged condition: *Central R. R. etc. Co. v. Rogers*, 57 Ga. 336; *Susong v. Florida etc. R. R. Co.*, 115 Ga. 361, 41 S. E. 566; *Fox v. Wabash R. R. Co.*, 38 N. Y. Supp. 88, 16 Misc. Rep. 370; *International etc. Ry. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. 541. In an action against a terminal carrier for injuries to stoves while in transit, evidence that they were improperly packed in the car by the shipper or initial carrier is sufficient, with evidence of proper handling of the sealed car by the defendant while in its custody, to rebut the presumption of negligence: *Texas etc. Ry. Co. v. Kelly* (Tex. Civ. App.), 74 S. W. 343. Under a statute declaring that the last carrier which receives goods "as in good order" shall be responsible to the consignee for any damage to them, such carrier cannot show that the goods were not received in good order by giving a receipt which is wholly silent on the question: *Georgia R. R. etc. Co. v. Forrester*, 96 Ga. 428, 23 S. E. 416.

SCHEIFERT v. BRIEGEL.

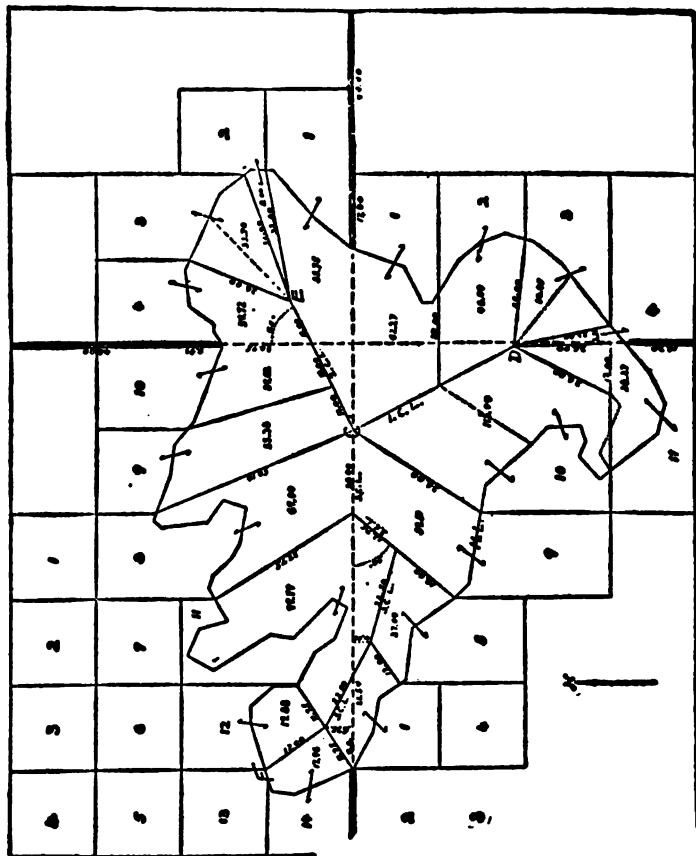
[90 Minn. 125, 96 N. W. 44.]

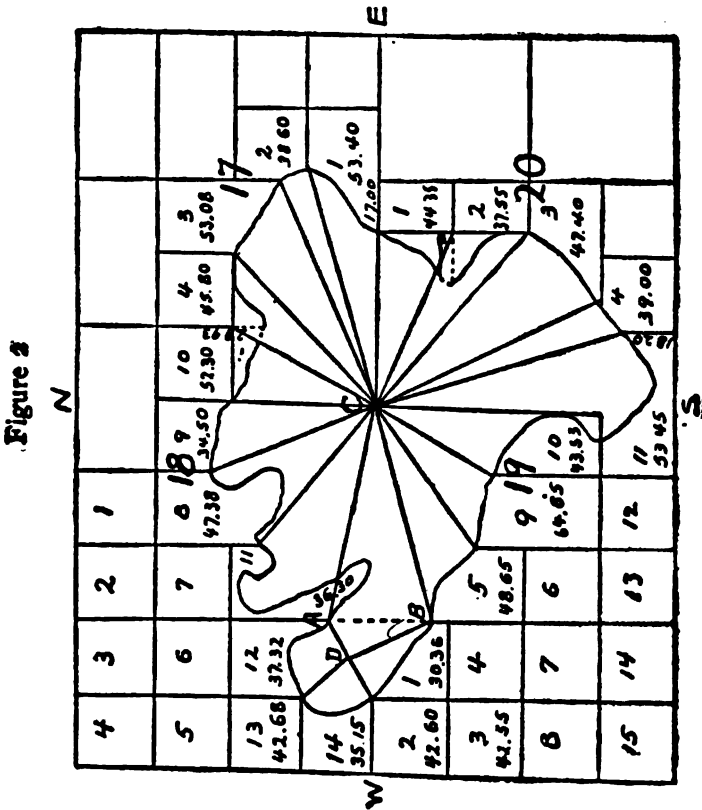
BOUNDARIES Where Water of Lake Recedes.—When an irregularly shaped, non-navigable lake without outlet or inlet dries up, it is not proper to divide the bed among riparian owners by establishing central points and lines, and extending the side lines of riparian tracts from where they cross the meander line to such points and lines. (pp. 402, 406.)

BOUNDARIES Where Water of Lake Recedes.—When the waters of a non-navigable lake recede and disappear, each riparian proprietor owns that part of the lake bed included in the triangle made by projecting lines from the points where the side division lines respectively cross the marginal line to the center of the lake; but if the lake is of irregular shape and without outlet or inlet, the inequalities occasioned by the broken shore line should be equitably adjusted between the contiguous owners by disregarding the irregularities, or by treating the lake as composed of separate bodies of water. (pp. 406, 407.)

Action to determine boundaries between riparian owners, the lake in front of whose property had gone dry. The following are the plats referred to in the opinion:

Figure 1.





George A. McKenzie, W. H. Leeman, John Lind and A. Ueland, for the appellants.

Albert L. Young, for the respondent.

127 LEWIS, J. Swan Lake, in Sibley county, meandered and non-navigable, originally contained several hundred acres, occupying portions of sections 17, 18, 19 and 20, township 112, range 31. For a great many years it has been gradually drying up, and at the time of the commencement of this action was practically dry land, and the various shore owners commenced this proceeding for the purpose of partitioning the bed of **128** the lake. The trial court divided the land in accordance with the plat, Figure 1, and for the purpose of division established three central points, C, D, and E, connecting them by center lines, marked upon the plat, 1 C. L., 2 C. L., and 3 C. L.

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Having established these center points and center lines, the court divided the land among the several owners by extending the side lines of the several tracts from the point where they crossed the meander line to points C, D, and E, and to points on the center lines as indicated by the plat. Certain of the property owners complain of the result upon the ground that the division is unequal. Some of them contend for the rule that the dividing lines should radiate to the center of the lake; others insist that it is not practicable to establish a center for division in a lake of this character, but that it was proper to adopt center lines. The latter, however, are not satisfied with the center lines established by the trial court, but suggest certain modifications, and propose that, with proper center lines established, the side division lines of the several fractions be extended at right angles to the center lines.

The question presented, then, is, What is the proper method of dividing the bed of the lake under such circumstances?

In *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670, it was stated that shore owners take to the center of the lake, but in that case there was under consideration merely the question whether the shore owner was entitled to that portion of the land exposed between the meander line and the water, which had perceptibly receded, as against a patentee of the land from the United States government, and the question as to what should constitute the center of the lake, and when that method should be varied or strictly applied, was not before the court.

In *Shell v. Matteson*, 81 Minn. 38, 83 N. W. 491, the only question involved was the constitutionality of Laws of 1897, page 478 (chapter 257), and that act was held unconstitutional upon the ground that the riparian owners held title to the center of the lake.

In *Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982, the inquiry was whether or not one of the owners should be restricted to the full government subdivision in which the fraction of his land was located, and be cut off from the lake by extending the land of an adjoining shore owner. In the discussion of that question, in which the court declined to follow the Wisconsin rule, it was said that each owner was entitled ¹²⁹ to the land between the shore and the center of the lake. But in that case the meander line as drawn by the government survey was incorrect, and the dispute was in dividing up the land between the meander line and the lake proper.

The rule has long been established that riparian owners upon a stream take to the center of the current: *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 59 (82), 88 Am. Dec. 59; *Olson v. Thorndike*, 76 Minn. 399, 71 N. W. 399. But we have no knowledge of any attempt to apply this rule to lakes, where there is no inlet or outlet. It would seem reasonable that where a lake is long, and comparatively narrow, it may be treated as a river, and a center line established from one end of the lake to the other, which should be considered the thread of the stream. Such rule could also, for the same reason, be adopted in case of irregularly shaped lakes, where there had been an inlet and outlet, and through which there might have been either a real or theoretical current, which would be deemed to be the center line. In such cases the various owners may be said to have purchased their property with a view to the original situation.

In the case before us the evidence does not disclose whether originally, or in times of high water, there was an inlet and an outlet to the lake, nor does it appear whether there is a gradual slope toward the center on all sides of the lake. The theory upon which the court proceeded was that the method adopted accomplished a more equable division among the various owners than any other system, but the manner in which the waters receded from time to time was not taken into account. Because of the irregular shape of the lake, a division made by running the side lines of the various fractions to the center would be unequal, and unjust to the owners of those fractions peculiarly situated, and apparently for this reason the central point principle of division was rejected. It is apparent that in the method adopted there was an attempt to combine two systems—one running the side lines to the center points of the lake, and the other to run them to center lines, which, theoretically, were the thread or middle of the stream.

The application of the center line principle to this lake presents very serious difficulties. In the first place, we discover no rule according to which the center lines were established, except that they were run from ¹³⁰ the three principal points, F, D, and E, Figure 1, to the center point C, as nearly as possible equidistant from the adjacent shore. The question arises at once, what better reason is there for running a center line from F, in the manner indicated, than from the bay in lot 11, section 18, or from the bay in lots 8 and 9, section 18? And, if the center line may properly begin at the shore line F, why

should not the center line D. be extended to the shore at the west line of lot 4, section 20, and why should not the center line terminating at E be extended to the shore between lots 3 and 4, or between 2 and 3? It is evident that these lines were drawn and center points located without reference to any natural condition of the original lake, either in respect to depth or natural current, and, so far as we are able to see, resulted in arbitrary division without regard to the legal rights of the owners.

There is no doubt that the division must be made according to the principle applicable to accretions or relictions, as noticed in *Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982. As before stated, where the shores of a lake are comparatively even, and the lake is either round or long, few difficulties arise in applying one of the principles of division above mentioned; but where the shore line is uneven, and the body of water of an irregular shape, the difficulty comes in avoiding a conflict of different interests.

In the New England states many questions have arisen in reference to the division of lands which have accumulated along the seashore between low and high water mark, and the courts have aimed to establish a principle which would result in giving the riparian owners an equal division in the accumulated soil. For instance, in *Gray v. Deluce*, 5 Cush. 9, in dividing the flats which had accumulated in a cove between high and low water, a base line was run across the mouth of the cove, and parallel lines were drawn at right angles with the base lines from the ends of the division lines of the channel to low-water mark. In that case the flat to be divided was of the same width as the channel, and the result was that each proprietor was given an equal division, and the division lines could therefore be extended without variation. But in the case of *Rust v. Boston Mill Corp.*, 6 Pick. 158, the cove was circular, and the distance across its mouth shorter than the shore line of the upland, and the division was made by causing the side lines to converge upon the base line at the mouth of the cove so as to divide the accumulation proportionately. Again, in the case of *Emerson v. Taylor*, ¹³¹ 9 Greenl. (Me.) 42, 23 Am. Dec. 531, there was a conflict of interests, and the base line was drawn between the two points where the side lines of division crossed the high-water mark, and from such base line, at right angles to it, lines were extended to low-water mark, and, the shore being on a curve, the various extensions thus made left

a surplus or loss, which was divided evenly between the adjoining parcels. A review of many of the New England cases upon this subject will be found in a note to *Northern Pine Land Co. v. Bigelow Co.*, 21 L. R. A. 776. In all of them the courts were dealing with the space left bare by the receding waters, or with land which had accumulated, the main body of water being still in existence.

The principle running through the decisions is that the riparian owner actually owns that part of the accretion which lies between the points where the division lines cross the margin in a straight direction to the center of the channel, and, if there is no channel, then converging to a common center. Cases have arisen where, from the very nature of the situation, these general rules could not be strictly applied. As stated in *Walker v. Boston*, 3 Cush, 1, 22: "Many coves, inlets, and estuaries of rivers are so irregular and various in outline, and so traversed by crooked and meandering creeks and channels, from which the sea does not ebb, that it is utterly impossible to apply to them any of the rules which have been applied to other cases."

The difficulty to be anticipated in dividing up the bed of a lake where there is no center line is stated by Justice Campbell in *Lincoln v. Davis*, 53 Mich. 375, 390, 51 Am. Rep. 116, 19 N. W. 103: "In carrying out lines of ownership in narrow streams, it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes all lines from the shore tend to converge in some central part of the lake, and, while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would, by his extent of shore ¹³³ line, obtain a share beyond the center. But it seems impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding in the nature of a partition, which will fix the various possessions."

And again, in the case of *Jones v. Lee*, 77 Mich. 35, 40, 43 N. W. 855, the same learned justice, in discussing the general question, states: "It appears clearly enough in the present case that, while there is a considerable frontage facing north-

west or southeast, the lake being longest in that direction, there must also be large end frontages which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shores. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it could not be done by reference to any *filum aquæ*, or middle thread, but must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses."

And in *Hardin v. Jordan*, 140 U. S. 371, 402, 11 Sup. Ct. Rep. 808, 35 L. ed. 428, the court says: "If there should arise any question between the plaintiff and other riparian owners of lands situated on the margin of the lake as to the convergence of the side lines of the plaintiff's land in the lake, it can be disposed of by the parties themselves by a resort to equity, or to such other form of procedure as may be proper." And in referring to the difficulties of applying the general rules of division it was said: "Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be the most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends."

To return to a consideration of the lake bed in question, eliminating the center line theory for the reason already stated, we are unable to apply any principle of ownership to the disputed land except the one already recognized by this court in the decisions above noted; i. e., that the several riparian proprietors own that portion of the increase immediately adjacent to and included in the triangle made by projecting lines from the points where the side division lines respectively cross the marginal line to the center of the lake. Had the waters only ¹³² receded a few rods from the marginal line, there would be little difficulty in dividing up the strip of land thus laid bare; but in proportion as the water receded toward the center the difficulties would increase, and, now that the water has entirely disappeared, we find the side lines converging upon one another to such an extent that the rule cannot be strictly applied.

Whatever inequalities or injustice may arise from these conflicting interests caused by the irregularity of the shore must be solved upon some equitable basis which will, as nearly as

possible, give to each proprietor that portion of the increase which belongs to him. In the first place, what is the center of the lake bed? Is it the center of the figure (lake bed), or is it the deepest portion to which point the waters gradually receded and at last disappeared? The latter might coincide with the former, but, where the two do not coincide, which should control? If the waters had receded, leaving some of these small bodies of water at different points in the original lake, division might be made upon the theory that they constitute independent lakes, to be treated as central points. But, as a general rule, such conditions do not exist, and the center of the figure must be accepted as the common center.

An examination of the plat Figure 2, where a central point, C, is assumed, discloses that, if a division be made according to this principle, lot 1, section 20, will have an advantage over lot 2, which lies immediately south, on account of the peculiar formation of the point or projection of land which extends into the lake. The same thing occurs in lot 4, section 17, and lot 10, section 18, the latter having the advantage, and a difficulty arises as between lots 10 and 11, section 19. The chief difficulty, however, is in reference to lots 1, 12, and 14, at the western end of the lake.

Commencing with lots 1 and 2, in section 20, lot 1 should not be permitted to have the advantage given it by the projection into the lake at the intersecting line between 1 and 2. The inequality occasioned by this irregularity in the shore ought to be divided between the parties immediately affected. It is a fair adjustment as between the two lots that such projection be ignored, and the division line running to the center point start, not at the marginal line, but at the point where the division line of lots 1 and 2 crosses a line drawn from the point where the northerly side line of lot 1 crosses the marginal line to the point ¹³⁴ where the south line of lot 2 crosses the marginal line as indicated on Figure 2. This would result in giving to lot 2 a slight portion of the increase directly in front of the southwest corner of lot 1. The same principle applied to lot 4, section 17, and lot 10, section 18, makes an equable division, as indicated on the plat. In respect to lots 10 and 11, section 19, the inequality may be adjusted as indicated on the plat. This arrangement gives lot 10 all it is entitled to, and gives lot 11 no credit for the small bay of the lake where the dividing line between the lots crosses the marginal line.

Lot 12, section 18, bordering on the southwest corner of the lake, had a considerable water frontage, but, on account of the peculiar shape of the point of land at the southerly part of lot 11, the division line between lots 11 and 12 crosses the marginal line at a point too far south to leave any considerable portion of the lake bed adjacent to lot 12, and the interests of lots 1, 11, 12, and 14, conflict in any attempt to divide up the bed immediately in front of those lots. There are two ways of adjusting this inequality: 1. By disregarding the point of land at the southerly end of lot 11, and dividing the space on the principle applied to lots 1 and 2, section 20; and 2. Treat the bay bordering on lots 1, 14, and 12, west of the dotted line A, B, as an independent lake. The latter method might very properly be applied if, as the waters receded, some portion were cut off from the main part of the lake by a ridge across the neck of the bay, or if there were a deep central point where the water remained last. The evidence is silent on the subject, and we can only assume that such condition did not exist, and that the lake bed slopes gradually from west to east. However, even if such were the case, this bay may be treated by analogy as a separate lake, and by so doing the interests would appear as indicated in the plat Figure 2, assuming D to be the center point. This arrangement leaves the irregular tract A, B, D, C, less the portion of lot 11 within its borders, the property of the owners of lots 1, 14, and 12, which should be apportioned between them by the court in accordance with the acreage acquired by each in the bay west of the dotted line A, B.

We are aware that in applying this method of dividing the lake bed it will be a matter of some difficulty to find the exact center points. They may be located by the interested parties by common consent, ¹³⁵ and, if they cannot agree, a competent surveyor can ascertain them by actual tests, or by the application of a mathematical rule which is used for the purpose. It is also apparent that some of the divisions of land thus allotted would be of no practical value on account of their peculiar shape. No doubt the small tracts would be purchased by the larger holders, or be otherwise adjusted to make the land practically useful.

The method of adjustment here suggested may not be suitable for the division of all irregular lakebeds, but we have aimed to outline a plan which will give the riparian owners as near as possible what is theirs by law. Let it be understood that the effect of this decision is not to direct a division of the lake in

question according to figure 2. We have attempted only to lay down certain principles which may be applied in case the facts shall prove to be as we have assumed them to be. Upon a new trial evidence should be taken as to the history of the lake, and the division worked out as near as may be in accordance with the principles herein defined.

Order reversed and new trial granted.

Accretions and Alluvion are discussed in the monographic notes to *Hagan v. Campbell*, 33 Am. Dec. 276-281; *Coulthard v. Stevens*, 35 Am. St. Rep. 307-313; and consult, also, the case of *Widdecombe v. Chiles*, 173 Mo. 195, 73 S. W. 444, 61 L. R. A. 309, 96 Am. St. Rep. 507, and cases cited in the cross-reference note thereto. As to the manner of fixing boundary lines when the waters of a lake recede or disappear, see *Carr v. Moore*, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250, 26 L. R. A. 609; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380, 44 N. E. 286, 33 L. R. A. 146; *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867.

BOARDMAN v. HOWARD.

[90 Minn. 273, 96 N. W. 84.]

LANDLORD AND TENANT—*Returning Premises in Good Order*.—A provision in a lease that the tenant shall return the premises in as good condition as when received, "loss by fire, inevitable accident, or ordinary wear excepted," obligates the tenant, upon the termination of the lease by agreement after a fire, to remove the debris and rubbish resulting from the partial burning of his goods. (p. 411.)

Stevens, O'Brien & Albrecht, for the appellants.

Henry C. James, for the respondents.

273 **LOVELY, J.** This is an action to recover unpaid rent; also, for expenses of the landlord incurred in removing property damaged by fire and left on the premises by the tenant after surrendering the same. The cause was tried to the court, who made findings of fact, and held as a conclusion of law that plaintiffs were entitled to recover a portion of one month's rent; also, a specific sum for expenses incurred by the landlord in taking away injured goods of defendants after they had quit. This appeal is from an order denying a new trial.

The following facts are embraced in the findings of the court and are supported by the evidence: Plaintiffs leased a building

in the ²⁷⁴ city of St. Paul to defendants for three years from January 1, 1901, at a stipulated monthly rental. The tenants took possession, and occupied it for the storage and sale of household furniture. On November 19th following, the premises became untenable by reason of a fire occurring without fault of either party. On the succeeding December 1st, plaintiffs entered without opposition by defendants, and engaged in repairs to make the place serviceable for reoccupation. During the month, defendants were permitted to take out their damaged property, and continued to do so until the first of the next January, when they informed plaintiffs that they had entirely removed therefrom and surrendered the premises. After the building was given up by the tenants, there still remained therein a large quantity of injured furniture and rubbish of no value, but distinguishable as having been a part of defendants' stock. This worthless material was removed by the plaintiffs at their own expense, to facilitate repairs and their future use of the premises. The court found the reasonable amount of this expense, and that defendants were liable therefor.

By the terms of the written lease it was provided that upon its expiration, or when terminated by forfeiture or otherwise, the tenants would yield up the premises in as good condition as when the same were entered, "loss by fire, inevitable accident, or ordinary wear excepted." There are other provisions in the lease relative to the surrender of the premises upon notice, as well as for the removal of offal and garbage, which were discussed on the argument; but under the view we have adopted these portions of the rental contract do not affect the result, and need not be considered.

There is no controversy over the amount found to be due as unpaid rent for a part of the month of November, but it is insisted that, after defendants had removed the portion of their stock which they took away in December, they might without breach of duty allow a considerable portion to remain upon the surrender of the building. A reasonable construction of the facts found by the trial court authorizes the view that the relations between the landlord and tenants were actually terminated by agreement on December 1st, when the landlord, desiring to take possession of his property to make repairs, entered on that day, and that the tenants were licensed by the landlord thereafter to be there for the purpose of taking away their property, and ²⁷⁵ continued to do so until it became apparent that the debris and rubbish resulting from the partial destruction of the

injured furniture which had been their property was valueless, when they ceased to remove it, but left it in the building, thus imposing upon the landlord this burden.

We have no doubt that the provision in the lease for the surrender of the premises by the tenants in as good condition as when received applies to the building itself. The exception relating to injury of the building by fire, while it would excuse the tenants from repairing or rebuilding, would not justify them in imposing burdens upon the landlord arising strictly from the tenants' occupancy and use of the premises; hence the injury by fire to the goods of defendants was a misfortune they had to assume themselves. A part of this was the injury to the furniture still belonging to them, and which, under the terms of the lease as well as upon reasonable considerations of justice, it was their duty, rather than the landlord's, to remove. It would follow that the tenants, under the privilege to take away their goods, could not enjoy it so far as beneficial, and leave a part of their damaged property in the building to encumber plaintiffs' possession, and the expenses incurred by the landlord in removing the rubbish which defendants left and declined to take away was a legal obligation against them.

Order affirmed.

If a Lease Provides for a Return of the premises "in as good condition as it now is, usual wear excepted," the tenant is not answerable if the property is destroyed, without fault on his part, during the term: Seevers v. Gabel, 94 Iowa, 75, 58 Am. St. Rep. 381, 62 N. W. 669, 27 L. R. A. 733.

KIRKEBY v. ERICKSON.

[90 Minn. 299, 96 N. W. 705.]

STATUTE OF FRAUDS.—A Sale of Wild Grass growing upon the vendor's land is within the statute of frauds, and a written contract cannot be dispensed with. (p. 413.)

Oluf Gjerset, for the appellant.

C. A. Fosnes, for the respondent.

²⁰⁰ COLLINS, J. From the findings of fact, which stand unchallenged in this court, it appears that the plaintiff, owner of a certain quarter section of land, entered into an oral contract with the defendant for the sale of wild grass then growing

thereon, the agreed price being seventy-five dollars, no part of which has been paid. Afterward the defendant entered upon the land, and cut one swath of this grass, about five feet wide and forty rods long. The defendant did not remove the cut grass, nor did he again enter upon the premises. No part of the remainder was cut by either plaintiff or defendant. The court below held that plaintiff could not recover the amount agreed upon, and its judgment will have to be affirmed.

The grass which was the subject of the oral contract was a part of the plaintiff's real estate, and the agreement was void, because it attempted to create an estate in land, and was not in writing, as required by General Statutes of 1894, section 4215. There has been a great deal of discussion ³⁰⁰ upon this subject, and the courts of last resort are greatly at variance, not only as to the rule to be applied, but also as to the reason for holding one way or the other. But in this particular case we simply have to ascertain whether the alleged contract of purchase involved, either by express stipulation or by fair implication from the circumstances, an agreement that the vendee should have the right to enter upon or occupy the vendor's land during a definite or indefinite time after the bargain. Where such an agreement is a part of the transaction it seems clear that an interest in land is contracted for and agreed to be given. Such an agreement comes within the statute of frauds, and a written contract cannot be dispensed with: Brown's Statute of Frauds, sec. 257a; 2 Taylor on Evidence, sec. 952. See, also, 1 Benjamin on Sales, sec. 121; 1 Mechem on Sales, sec. 341.

At common law, grasses growing from perennial roots are regarded as *fructus naturales*, and, while unsevered from the soil, are considered as pertaining to the realty: Sparrow v. Pond, 49 Minn. 412, 32 Am. St. Rep. 571, 52 N. W. 36, 16 L. R. A. 103. We have no statute changing this rule, except General Statutes, section 5464, which has no relevancy here. In Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699, it was held that growing crops, *fructus industriales*, pass with the land upon the conveyance thereof without express mention, unless properly reserved: See, also, Kammrath v. Kidd, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213. This is because for the purposes of sale they are regarded as part of the real estate.

In this particular case the right of the defendant to enter upon plaintiff's premises for the purpose of cutting and removing the grass was implied from the fact of the sale. This gave the former exclusive possession of the land upon which the grass

grew for the purpose of cutting and removing it; a limited possession to be sure, but sufficient for him, in case the contract had been valid, to maintain an action against any person entering upon the land and interfering with his right to cut and remove the grass: *Crosby v. Wadsworth*, 6 East, 602. Such a case must be distinguished from one where the vendor of the property sold is to sever it from the soil himself. Verbal sales of that character have frequently been upheld as not within the statute. It is clear that this agreement, as found by the court, was for the sale of an interest in land, and came within the prohibition of the statute.

³⁰¹ But, even if it could be held that the contract was for the sale of personal property, the price agreed upon exceeded fifty dollars. There being no written note or memorandum of the contract, no acceptance of the goods, and no payment of any part of the purchase money, it came within the provisions of General Statutes of 1894, section 4210, and was void.

The plaintiff's counsel suggests that when the defendant entered upon the land and cut a small part of the grass there was a sufficient compliance with the statute. But by this act alone he did not accept or receive any part of the property attempted to be sold.

Judgment affirmed.

The Principal Case is cited in *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126, where it is held that a contract for the purchase of standing timber is a contract for an interest in lands, is within the statute of frauds, and must be in writing. For other authorities on the question of whether a sale of timber is within the statute, see *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404, 49 Atl. 1051. It is held in *Smith v. Leighton*, 38 Kan. 544, 5 Am. St. Rep. 778, 17 Pac. 52, that an agreement in writing is necessary in the sale of growing grass. See, also, *Mighell v. Dougherty*, 86 Iowa, 480, 41 Am. St. Rep. 511, 58 N. W. 402, 17 L. R. A. 755; *Aldrich v. Bank of Ohio*, 64 Neb. 276, 97 Am. St. Rep. 643, 89 N. W. 772, 57 L. R. A. 920; *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213.

**SULLIVAN v. MINNEAPOLIS, ST. PAUL AND SAULT
SAINTE MARIE RAILWAY COMPANY.**

[90 Minn. 390, '97 N. W. 114.]

RAILROADS—Defective Station Platform.—A woman who goes to a railway station in the evening after business hours, the depot being closed, the lights extinguished, and the agent gone, to find her husband, who has gone there to attend to some shipping, assumes the risk of the platform being unsafe. (p. 416.)

Alfred H. Bright, J. H. Wendell and C. A. Pidgeon, for the appellant.

F. E. Latham and James C. Tarbox, for the respondent.

³⁹⁰ **LEWIS, J.** This action was brought to recover damages for personal injuries occasioned by stepping into a hole in the depot platform of appellant ³⁹¹ company. At the close of the evidence defendant moved for a verdict upon the ground that plaintiff had failed to prove a cause of action, because she had no right to be upon the depot platform at the time, and because it conclusively appeared from the evidence that the company was not responsible for the defect in the platform. The motion was granted, and plaintiff moved for a new trial upon the ground that the verdict was not justified by the evidence, and that the court erred in rejecting certain testimony offered by plaintiff as to the condition of the plank which had been broken or removed, causing a hole. From an order granting a new trial, appeal was taken.

It does not appear upon what ground the court granted the motion, but, if it conclusively appears from the evidence that plaintiff cannot recover in any respect, it will be unnecessary to consider the second ground. Plaintiff was a married woman, twenty-nine years of age, and resided in the village of Maple Lake, with her husband, who was in the butcher business. The depot is situated about a block from the butcher-shop, and at about 8:20 on the evening of October 8, 1901, her husband left the shop, and went toward the depot, for the purpose of attending to the shipping of a carload of stock, at which time the station was open and lighted and the lamp on the station platform was burning. The regular west-bound passenger train arrived and departed some time between 8:20 and 8:28. Plaintiff's husband reached the depot within ten or fifteen minutes after the train departed, was there about five minutes trans-

acting business with the agent, and then went to the stock-yards in the vicinity; and after his departure the agent closed the office, put out all the lights, and went home. Soon after the agent went away, plaintiff left the butcher-shop and went to the depot for the purpose of finding her husband and getting the keys from him that she might lock up the shop. She was accompanied by a younger sister, who testified that plaintiff went upon the platform in the usual way, walked along toward the door of the depot office, and stepped into the hole, resulting in the injuries complained of; that she helped her out, and in about ten minutes assisted her home. Plaintiff testified that there were no lights, and it was very dark. From these undisputed facts it is clear that, although the plaintiff went to the depot expecting to find her husband there, she knew the train had come and ³⁹² gone, and as she approached the depot she saw that the lights had been turned out.

In the case of Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, ante, p. 384, 95 N. W. 586, it was held that, if respondent went upon the station grounds in good faith, in pursuance of the purpose of meeting a person for business consultation, who he had reason to believe was to take a train, the company owed him the duty of ordinary care in conducting the unloading operations. It was quite clear in that case that, if respondent had gone to the depot about train time for the purpose of taking the train or accompanying one who was to take it, and was injured, he would not be a trespasser, and would be entitled to recover; but a serious question was raised whether liability arose under the peculiar circumstances of the injury and the time he visited the station. It was held that there was no reasonable distinction between visiting a depot for the purpose of taking a train or accompanying a person boarding a train and going to the depot to have a business conference with one about to depart or arrive. It was also considered that a mistake of an hour as to the time of the arrival or departure of the train would not, of itself, relieve the railroad company.

But there is a clear distinction between the facts in that case and the one now before us. There the accident occurred in the daytime, and there was nothing to notify the visitor that the premises were intended to be closed to the public at that particular time. Here it was past business hours, the lights were turned out, and the premises enveloped in darkness. There was no act on the part of the company to lead plaintiff to believe that it was holding its place of business open to the

public, or even to suggest that her husband was transacting business in the depot office, except the fact that some time prior she had seen him go in that direction. On the contrary, there was everything to notify her that the place was closed. In the absence of some invitation, express or implied, to go upon the premises at that time of night, plaintiff assumed the risk consequent upon her movements. There is nothing to suggest that the company was guilty of gross negligence in the care of its platform and in permitting the hole to remain unprotected.

For these reasons the first order of the trial court was right, and the order granting a new trial was error.

Order reversed.

While a Railway Company cannot be expected to be continuously on its guard as against loiterers and trespassers, yet it should anticipate that its station-house and depot grounds may be used as a place of meeting by people for various lawful purposes at or about train time: Klughez v. Chicago etc. Ry. Co., 90 Minn. 17, ante, p. 384, 95 N. W. 586.

PERRY v. TOZER.

[90 Minn. 431, 97 N. W. 137.]

EMPLOYMENT of Infant in Violation of Law.—If Injury results to an infant employé in a sawmill from a failure properly to guard dangerous machinery, his employer, who has not procured a certificate from the school authorities permitting the employment, as required by statute, is prima facie liable in damages. (p. 423.)

DAMAGES FOR PERSONAL INJURY—When not Excessive. A verdict of seven thousand seven hundred and fifty dollars for injuries received by a boy of fourteen years requiring the amputation of his right leg below the knee is not excessive. (p. 424.)

Barrows & Morrison, for the appellant.

Arthur W. Selover, for the respondent.

⁴³¹ LOVELY, J. Action to recover for personal injuries sustained by a boy of fourteen years while employed in defendant's sawmill at South Stillwater. ⁴³² There was a verdict for plaintiff. This appeal is from an order denying defendant's motion for judgment notwithstanding the verdict or a new trial in the alternative.

The evidence tended to show that plaintiff had worked in defendant's mill tending a "slab conveyor" twenty-four days

when the accident occurred. The purpose of the slab conveyor was to transmit boards to two circular saws, where they were to be cut, and from thence carried to a place below, where pieces that could be used for lumber would be picked out by other servants. Part of the working machinery connected with the slab conveyor consisted of two metal sprocket wheels, the upper one fastened to a shaft near the top of a table where the saws were set, adjoining which plaintiff was required to stand, the surface being at his breast. The lower sprocket wheel was adjusted on a shaft three feet below the upper one. Both wheels were kept in motion by chain belting, whereby the attached shafts and saws thereon were propelled with great velocity. It was the plaintiff's duty to stand upon a platform adjacent to the lower wheel, which was covered to some extent by a wooden box. He was required to oil the machinery, handle the levers which stopped the movement of the sprocket chains and shafts, and keep pieces of wood from accumulating in front of the saws to prevent their being clogged. The necessity for removing the refuse wood from the front of the saws was quite frequent, and required plaintiff to use a stick, and to reach forward over the table to accomplish this purpose. When the accident occurred plaintiff was standing with his feet near the guard of the lower sprocket wheel. In attempting to remove pieces of refuse wood which were clogging the saws, he, under his claim, inadvertently intruded one of his feet into the rapidly moving gearing which was behind the outer surface of the box covering. It was caught and pulled into the machinery, inflicting injuries which required the amputation of his right leg below the knee, with severe consequent pain and suffering. There was a general verdict for plaintiff. Special questions were submitted at request of defendant, with answers favorable to plaintiff.

The alleged negligence for which plaintiff seeks recovery is:

1. His unlawful employment by reason of his immature years;
2. The neglect of defendant properly to guard the lower sprocket wheel and chain where his foot was caught; and 3. The failure by his employer ⁴³³ to give proper warnings and instructions of the risks incurred in the service. The assignments of error question the sufficiency of the evidence, the propriety of several instructions given at the trial, as well as the refusal to give others in behalf of defendant.

From an examination of the entire evidence we are satisfied that it reasonably tends to show that the guards in front of

the gearing where plaintiff's foot was caught, which to outward appearances protected him, would permit the slipping of the operator's foot into the revolving machinery behind the wooden box covering it; and whether the defendant was negligent in this respect was for the jury. Neither is it conclusive that the plaintiff was required to have made a more thorough examination of the gearing and guard near which he was required to place his feet while performing his duties, nor that he assumed the risks and hazards occasioned thereby; hence that part of the blended motion asking for judgment was properly denied. We cannot say, either, that plaintiff should have exercised greater caution, or failed in ordinary care, in preventing his foot from being caught. The evidence tended to show that he had received no warning of danger, and upon all these questions the verdict must be held conclusive, and allowed to stand, unless there was error in respect to a material instruction upon the burden of proof, and the damages are so large, in view of plaintiff's injuries, as to indicate that it was the result of passion and prejudice.

The serious question for our consideration on this review arises upon an instruction wherein the court, in reference to plaintiff's age, attempted to give effect to two legislative enactments of this state—Laws 1895, p. 386 (c. 171), as amended by Laws 1897, p. 625 (c. 360). The first section of chapter 171, page 386, Laws of 1895, forbids the employment of children under fourteen years of age in any factory, workshop, or mine. Section 2 prohibits any child who can attend school from being employed at any occupation during school hours. Section 3 provides that the commissioner of labor and assistant factory inspector shall have a right to demand a certificate of the physical fitness of infants for labor from some regularly licensed physician. Section 7, which is specially material here, provides that: "No child actually or apparently under sixteen years of age shall be employed in any factory, workshop or mercantile establishment ⁴³⁴ or in the service of any public telegraph, telephone, or district messenger company, or other corporation, unless the person, firm or corporation employing said child procures and keeps on file . . . a full and complete list of such children employed therein."

Section 8 provides that in towns or cities having a superintendent of schools the certificate provided for in section 7 shall be issued by him, or when there is no superintendent of schools then by a member of the school board; and provides for a statement therein of special qualifications of the child.

Section 10 provides for a visitation of the factory, workshop, etc., by the superintendent of education and the school board. Section 12 enacts that: "Every owner, superintendent, agent or overseer of any factory, workshop," etc., "who employs or permits to be employed therein or thereby any child contrary to the provisions of this act, and any person who employs a child contrary to the provisions of this act . . . shall be guilty of a misdemeanor, and upon conviction thereof . . . shall be fined not less than twenty dollars nor more than fifty dollars for each and every offense. A failure to produce to an officer or employé of the bureau of labor, or to a member or authorized agent of the board of education or board of trustees of the city or school district in which the said child is employed, on demand, the certificate and register required by this act, shall be prima facie evidence of the illegal employment of the child whose certificate is not produced."

This law was amended by Laws of 1897, page 625 (chapter 360), which provides that: "No child under fourteen years of age shall be employed at any time in any factory or workshop or about any mine. No such child shall be employed in any mercantile establishment nor in the service of any telegraph, telephone or public messenger company, except during the vacation of the public schools in the town where such child is employed. No child under sixteen years of age shall be employed at any occupation dangerous or injurious to life, limb, health or morals."

⁴³⁵ Section 5 of the previous law is amended so that it reads as follows: "Whenever it appears upon due examination that the labor of any minor who would be debarred from employment under the provisions of sections 2 and 4 of this act [prohibiting the employment of infants, so as to prevent their attendance upon school] is necessary for the support of the family to which said minor belongs, or for his own support, the school board or board of school trustees of the city, village or town in which said child resides may, in the exercise of their discretion, issue a permit or excuse authorizing the employment of such minor within such time or times as they may fix."

The undisputed evidence tended to show that at the time of plaintiff's employment he was three days past his fourteenth birthday. No evidence was offered to show that the certificate provided for in section 12 of the act of 1895 had been procured, or was in possession of defendant, nor was it disputed that such employment was illegal in this respect, and sub-

jected defendant to the penalties provided for. The instruction given by the trial court which counsel for defendant challenge, in substance stated that the fact that plaintiff was under sixteen years of age in connection with his employment in the sawmill was, in violation of the statute, and the injury from the machinery which he was tending at the time made a *prima facie* case of negligence against defendant, so that, if the plaintiff had rested upon this proof, and no evidence had been introduced to contradict it, he would have been entitled to recover. But it was further stated by the court in qualification that this *prima facie* showing might be rebutted by evidence to show that the machine which caused plaintiff's injury was properly guarded, or that the plaintiff himself contributed to the accident.

Leaving out of consideration the probable effect of these instructions, it may be said that the evidence to show that plaintiff exercised the care for his own protection required by one of his years was sufficient to sustain the verdict, and, had the court omitted to instruct that the burden was upon the defendant to establish these facts in defense, we should not have doubted that it was our duty to approve the findings of the jury; but the question is clearly presented by this instruction ⁴³⁶ whether the violation of the statute, followed by injury from causes necessarily incident to the employment and business of defendant, shifted the burden otherwise imposed upon plaintiff, but upon mature reflection we think our doubts in this respect must be resolved in favor of the plaintiff.

Counsel for defendant insist that the statutes from which we have quoted at length, so far as the same related to children of the age of plaintiff, were intended to secure for their benefit educational benefits only; therefore could not be regarded as a proximate cause of an accident occurring through the neglect of the master to furnish reasonably safe instrumentalities for their work upon dangerous instrumentalities, or in properly protecting the same, or the failure to give necessary instructions to an injured lad of the specific risks he incurred. We cannot adopt the view that the sole object of these statutes was to secure educational advantages to children. Neither the history of the subject nor the terms of the enactments themselves will justify such a conclusion.

About the middle of the last century, when England had achieved marked success in the development of its mines, which furnished the means to operate its workshops by steam power,

and thereby attained its commercial supremacy in the world markets, cheap child labor was largely utilized, to the detriment of the morals, health, and personal safety of very many young children, which aroused the humane and charitable impulses of the reformers and philanthropists of that country, who conducted an earnest and effective propaganda to mitigate the evils that deprived the objects of their solicitude of the benefits of education and moral instruction, subjecting them to the evils of a servile peonage, to minister to the selfishness of the employer. In 1878 this agitation resulted in a parliamentary codification of several former enactments embracing a complete system to enlarge the scope of existing laws, wherein not only the direct interests of the children themselves were considered as an important factor in the scheme, but also the prevention of ignorance, suffering, and crime, with their results to the public welfare. A reference to the history of the "factory acts" of England, which may be found in any modern encyclopedia, clearly indicates that these laws were adopted not only to diminish ignorance and immorality, but also to prevent the maiming and injuring ⁴³⁷ of young children in hazardous occupations, whereby they would become burdens upon the public.

Our own statutes from which we have quoted above are not as complete nor as systematically arranged as the perfected English scheme, yet it seems quite apparent that the protection of life and limb among the uneducated infants of the state was intended as well as in the English prototype. While a distinction is made in our law between children under fourteen years and those between fourteen and sixteen years, the difference is one of degree, not in the obligations imposed. This is but a fair inference from our previous views of the capacity of infants to protect themselves from the dangers contemplated, for we do not have to look beyond the decisions of this court to find evidence that the intelligence of the youth who are engaged in hazardous employments is a material fact for the consideration of the jury to determine whether they assume the risks incurred or contribute to unfortunate results arising therefrom: *Twist v. Winona etc. R. R. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; *Hepfel v. St. Paul etc. Ry. Co.*, 49 Minn. 263, 51 N. W. 1049.

Counsel's claim, broadly stated, is that it was the operation of the machinery, and, at most, the improper protection of the same, that was the proximate cause of the injury, and not the violation of the statute. This claim finds support in some

decisions, notably that of *Goodwillie v. London etc. Co.*, 108 Wis. 207, 84 N. W. 164. But authorities of the highest respectability hold that the violation of a statute prohibiting the employment of a child in a hazardous occupation, where such employment is prohibited by law, establishes a right to recover for negligence; hence, in such cases liability is to be presumed from the employment in disobedience of law: *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572; *Breckenridge v. Reagan*, 22 Ohio C. C. 71; *Morris v. Stanfield*, 81 Ill. App. 264; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460, 30 L. R. A. 82. Unless we can say that the statute has no effect in a suit for damages where the law had been violated, we are required to hold that the employment which the legislature positively forbids furnishes evidence tending to show at least presumptively that one of the causes of the injury in this case was the violation of the statute, in analogy to the well-known doctrine that ordinances regulating the hitching of horses, the speed of trains in cities, or other subjects of municipal control are ⁴³⁸ held to be evidence to sustain the charge of negligence: *Weyl v. Chicago etc. Ry. Co.*, 40 Minn. 350, 42 N. W. 24; *Dugan v. St. Paul etc. Ry. Co.*, 43 Minn. 414, 45 N. W. 851.

It is well settled that a wrongdoer is at least responsible for the results likely to occur, or resulting as a natural consequence from his misconduct, or such as might have been reasonably anticipated: *Ransiel v. Minneapolis etc. Ry. Co.*, 32 Minn. 331, 20 N. W. 332. In cases of tort the application of the rule as to proximate cause is that, where several concurring acts, one of them a wrongful omission of defendant, produce an injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of an injury which might have been anticipated as a natural consequence thereof: *Campbell v. City of Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320. And the doing of an act prohibited by municipal regulation may be regarded as the proximate cause of an injury which directly resulted from other sources: *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

It is, however, of doubtful utility to refine upon the rule expressed by the maxim, "*Causa proxima non remota spectatur*," for plaintiff's right of action rests upon the broad ground that, where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in

the latter's favor against the former for neglect in such act or abstinence, even though the statute gives no special remedy. Even the imposition of a penalty by the statute does not oust the remedy by indictment, nor, a fortiori, by suit, for negligence, unless the penalty be given to the party injured in satisfaction for injury: Wharton on Negligence, sec. 443. This principle has been recognized and applied in this state, and it is now well settled that, where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent: *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543.

From the investigation we have made of the reasons for the statute upon which the instruction of the trial court was based, we have reached the conclusion that the certificate which the school authorities ⁴³⁹ are to give upon their examination of an infant was intended to secure educational advantages to the subjects of legal solicitude, and likewise to vest in the school officials the power to determine, in the exercise of wise judgment, whether, from the intelligence and capacity of such infant, it would be reasonably safe for him to engage in dangerous occupations. The failure to obtain this certificate was a violation of the statute, and entitled the plaintiff to a remedy for the negligent acts of defendant. Hence it was proper to give effect to the conceded disregard of the law, and, where an injury is within the mischief of the statute, it is not easy to see how less weight could be given to the statute than was expressed by the instruction of the trial court, which makes the violation of the law, with consequent injury from the dangerous machinery in use in defendant's mill, *prima facie*, but not conclusive, evidence of plaintiff's right to recover.

In the remaining assignments there are several criticisms of the charge of the trial court and the refusal of defendant's requests. We have considered these carefully, and are of the opinion that the charge as a whole properly defined the relation of master and servant, and the relative obligations in the exercise of the duty and care owing to each by the other. Where, in some instances, the court's instructions are not accurate expressions of the law, a reference to other portions of the charge shows that the jury could not have been misled to defendant's injury. Of the charge as a whole it may be said that it was

exceptionally clear and able, and gave the law required for the protection of defendant's interest as effectually as could be required.

The wounds inflicted upon plaintiff were severe and extremely painful. He was confined to the house for a considerable portion of time undergoing a surgical operation which has crippled him for life. In view of his age, the severity of his injuries, the suffering caused thereby, and his permanent disability, we do not think that the inference is to be drawn from the verdict of seven thousand seven hundred and fifty dollars that it was the result of passion and prejudice by the jury.

Order affirmed.

As to the Effect of an Employer violating statutory provisions intended for the protection of employes, see the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 891, 892. And as to the violation of a statutory duty, generally, as constituting negligence, see Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15; Chicago etc. R. R. Co. v. Mochell, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**PARKS v. ST. LOUIS AND SUBURBAN RAILWAY
COMPANY.**

[178 Mo. 108, 77 S. W. 70.]

STREET RAILROADS—Negligence—Passenger in Dangerous Position.—If a street railway company consents to a passenger's taking a dangerous position on its car and knowingly assumes to carry him in that position, it must exercise that high degree of care which the law requires a carrier to observe for the safety of his passengers. The degree of care to be observed by the railway company in such case must be in proportion to the danger which the passenger's perilous position entails. (p. 428.)

STREET RAILROADS—Contributory Negligence—Passenger in Dangerous Position.—If a passenger takes a dangerous position on a street-car, even with the consent of the company, he must observe for his own safety the care, proportioned to the apparent danger, that a man of ordinary prudence would observe under like circumstances, and, if he fails in this, and is injured from a cause arising out of, or incident to the position itself, without negligence on the part of the railroad company, it is not liable. Though the company is negligent, still if the passenger fails in such observance of ordinary care, he is guilty of contributory negligence and cannot recover. (p. 429.)

STREET RAILROADS—Passenger in Dangerous Position—Refusal to Carry.—A street railroad company has a right to refuse to carry a passenger who takes an unusual and dangerous position on its car. (p. 429.)

STREET RAILROADS—Contributory Negligence—Dangerous Position of Passenger.—If a passenger, in boarding a street-car, takes a dangerous position thereon with the knowledge and consent of the railroad company, and thereafter is not guilty of negligence, but is injured through the negligence of the company arising out of a condition which thereafter becomes extrahazardous, he cannot be defeated of his right to recover, on the ground that he was guilty of contributory negligence. (p. 430.)

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NEGLIGENCE, CONTRIBUTORY—Right to Recover.—A plaintiff may recover notwithstanding his contributory negligence, when the defendant is guilty of negligence in seeing the plaintiff's peril, and though owing him a duty and being able with ordinary care to avoid such peril, yet recklessly and wantonly inflicts injury upon him. (p. 430.)

NEGLIGENCE.—Passengers Never Assume the risk of the carrier's negligence. (p. 432.)

NEGLIGENCE.—Passengers Assume the Ordinary Risks incident to the act of traveling, but not an added danger caused by the negligence of the carrier. (p. 432.)

TRIALS.—Instructions may assume as established facts about which there is no dispute. (p. 432.)

McKeighan & Watts and R. A. Holland, Jr., for the appellants.

W. R. Gentry, for the respondent.

¹¹² VALLIANT, J. Defendants, two street railway companies, appeal from a judgment for five thousand dollars recovered against them in the circuit court of St. Louis county by the plaintiff on account of personal injuries alleged to have been received by him through their negligence.

There is not much dispute as to the governing facts of the case. In June, 1900, there was a strike among the employés of all the other street railroad companies in the city of St. Louis, and the only street-cars running were those operated by the defendant companies. The consequence was, the cars of these two companies were crowded with passengers beyond their normal carrying capacity. People crowded in, filling the bodies of the cars, the platforms and every part where a seat or foothold could be obtained. Plaintiff, on June 14, 1900, boarded a west-bound car of the St. Louis and Suburban Railway Company (which we will call the Suburban car) at the crossing of Fourteenth street and Franklin ¹¹³ avenue. The car was crowded with passengers to such an extent that the only space plaintiff could obtain on it was standing room on the step of the front platform outside of the gate that inclosed the platform. There was another man and a boy standing on the step in the same attitude plaintiff took. During the period of this strike, it was not unusual for men to ride on the steps of the platform outside the gates as those men were doing. At the point where plaintiff boarded the car the defendant's railway runs north and south, but a short distance after passing Franklin avenue it turns west, which is its main course. It is a double-track road, and the cars of both defendant companies

run over it. The step on which the plaintiff took his position was on the west side of the car going north, which would become the south side after it turned west, and was the inside, that is, the side next to the other track over which the east-bound cars came. The outside line of the step on which the plaintiff stood was on a line with the outside of the car, but the plaintiff's body projected beyond that line—he could not press himself closer in. The motorman saw the men and the boy on the step and told them it was dangerous to ride there, and that they ought to try to get on the other side, but they did not change their position. The conductor also saw the plaintiff there, and asked him for his fare while he was in that position, and received it. The plaintiff rode standing on the step outside the gate, from Fourteenth street to a point just beyond Vandeventer avenue, a distance of probably two miles or more, where the accident occurred. In going that distance the car passed around two or three curves and met several cars, east bound on the other track. Just west of Vandeventer avenue the tracks of the defendant companies curve to the north and then turn again to the west. Cars going in opposite directions meeting in this curve were brought more or less nearly in contact according to the ¹¹⁴ point in the curve at which they passed each other. The space between cars thus passing was variously estimated by different witnesses, but the testimony of all of them showed that at some point in the curve the meeting cars would come so close to each other that extra care was to be observed to avoid contact, and it was made the subject of special regulation. The printed rules of the companies gave the east-bound cars the right of way in the forenoon and the west-bound in the afternoon. Plaintiff was on a west-bound car and it was about 5 or 6 o'clock in the afternoon, so that this car had the right of way. The rules also required the car that did not have the right of way to come to a stop forty feet before entering the curve, to allow a car coming in the opposite direction to pass through the curve without danger of contact. On this occasion as the Suburban car going west approached this curve, a car of the St. Louis and Meramec River Railroad Company (which we will call the Meramec car) approached it from the opposite direction. Each of these cars was in plain view of the motorman in charge of the other. There is some conflict in the evidence as to whether the east-bound car stopped at all before the accident, but if it stopped at all it did so very close

to or just at the entrance of the curve. There is also some conflict as to the speed at which the Suburban car entered the curve and was going when the accident occurred. But whatever the truth about those disputed points may be, the fact is that the position of the Meramec car in reference to the curve was such and the movement of the Suburban car into and around the curve was such as that the plaintiff's body was brought into violent contact with the Meramec car and he was rolled between the two cars until the space between them became wider and he was dropped to the ground, having received serious injuries.

1. Appellant's first proposition is that the court erred in refusing the instruction in the nature of a demurrer to the evidence which defendants asked. The ¹¹⁵ substance of the proposition is that the position taken by the plaintiff, on the step of the platform, was so obviously dangerous, and that it so obviously contributed to the accident, that the court should have adjudged the plaintiff on his own evidence guilty of contributory negligence.

There are two standpoints from which this proposition is to be considered.

a. That the plaintiff's position was one of danger and that he would not have been injured if he had not been where he was, are facts indisputable. But was he guilty of negligence in being there? We need not dwell on the fact that the car was so crowded that he could not get on it in any other position, because he was not compelled to get on it at all. His taking passage on the car was a voluntary act. Traveling on a street-car in a great city is always attended with danger, whatsoever position in or on the car the passenger may assume. But if it is a position that the carrier offers to the passenger, or a position which the carrier assents to his taking, and knowingly assumes to carry him in that position, then it becomes the duty of the carrier to carry him safely in that position if it can be done by the exercise of that high degree of care which the law requires the carrier to observe for the safety of its passengers. The degree of care to be observed by the carrier in such case must be in proportion to the danger which the passenger's position entails—the more dangerous the position, the greater the care the carrier is bound to observe. And at the same time the law imposed on the passenger in like case the duty of observing for his own safety the care that a man of ordinary prudence under like circumstances would observe, and that care,

too, must be in proportion to the apparent danger—the more dangerous the position the more care a prudent man would be expected to observe. It is the duty of a carrier who has undertaken to carry a passenger in such a position to carry him safely if it can ¹¹⁶ be done by the exercise of the degree of care above mentioned, and it is correspondingly the duty of the passenger after he has taken that position to observe such care for his own protection as an ordinarily prudent man in a like position and under like conditions would naturally be expected to observe. Under these circumstances if the passenger is injured from a cause arising out of or incident to the position itself, without failure of duty on the carrier's part, the carrier is not liable. And though in such case the carrier fail to perform its duty and that failure results in the accident, still if the passenger fails also in his duty as above defined and his failure contributes to bring about the result, he cannot recover. But in judging the conduct of both carrier and passenger we must look only to conduct after the passenger has assumed the position, not charging the position itself to either as an act of negligence, but requiring both to keep in mind the peril incident to the position and regulate their conduct in reference thereto.

In this case the carrier knew the position the passenger had taken and assented thereto, and undertook to carry him in that position. We say this because the motorman saw him there and warned him that it was a position of danger and the conductor saw him there, and without warning and without remonstrance asked him for his fare and received it. If that had been a position of such danger that the carrier was unwilling to assume the duty of carrying the plaintiff therein the carrier had the right to require the plaintiff to leave the car. It was an unusual position, one involving more than usual risk, and the carrier had the right to refuse to carry him in that position. But unless some other circumstance or condition arose to increase the hazard, it was feasible to carry a passenger safely in that position. This is shown by the fact that, during this period of overcrowded cars, the defendants did carry men safely in that position, and especially by the fact ¹¹⁷ that this plaintiff was carried safely from Fourteenth street to Vandeventer avenue, passing in route many cars on the other track, and passing through two or three other curves. There is no act of the plaintiff, after taking his position on the step, that is complained of as negligence. The foregoing

views accord with former decisions of this court: *Huelsenkamp v. Citizens' R. R. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Willmott v. Corrigan etc. Ry. Co.*, 106 Mo. 535, 17 S. W. 490; *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739.

b. But assuming that taking the position on the step of the platform was itself an act of negligence, and that it contributed to the occurring of the accident, still there was a question for the jury. The motorman and conductor both knew that the man was there and knew the peril of his position; they also knew that he could not jump from the car while it was passing through the curve without the risk of falling and being run over by the approaching east-bound car, or of being run over if he did not fall. Yet in plain view of the other car, and seeing that it had not stopped as the rules of the company required, and as common sense dictated, the motorman of the Suburban car ran his car into the curve and on until he had crushed the plaintiff's body against the Meramec car. The facts of this case make a strong example of the wisdom of the rule which allows a plaintiff, in exceptional cases, to recover notwithstanding his own contributory negligence, when the defendant sees the plaintiff's peril and although able by ordinary care to avoid it, yet recklessly or wantonly inflicts the injury: *Kellny v. Missouri Pac. Ry. Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195.

The court did not err in refusing an instruction looking to a nonsuit.

2. The plaintiff's petition stated his cause of action based on alleged negligence of the defendants in bringing their cars into collision or such close proximity as to cause the plaintiff's injuries. The ¹¹⁸ answer of the defendants consisted of a general denial, a plea of contributory negligence based on the act of the plaintiff in taking the dangerous position on the step of the platform, and then followed what in their brief the learned counsel for appellant call a plea of assumption of risk, which is as follows: "And for a further defense defendants state that all the details of defendants' tracks and the manner of operating cars thereon were known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that the danger of riding upon the southern steps of the front platform of the west-bound car was known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that plaintiff assumed the risk of riding upon said part of said car on said occasion."

Appellants now complain that the instruction given at the request of the plaintiff ignored the defense set up in that plea.

That is not a good plea. The fact that the plaintiff had negligently taken a position on the platform step outside the gate was a fact already properly pleaded as an act of contributory negligence. To the plea of contributory negligence the plaintiff replied and the issue was properly joined. But the part of the answer above quoted, and which appellants call their plea of assumption of risk, presents no affirmative defense. If it is intended by that plea to say that the plaintiff's injuries were the result solely of his voluntary act of riding on the step of the platform, then it means that the injuries were not the result of the defendant's negligence, which defense was already covered by the plea of general denial. The petition having charged that the plaintiff's injuries were caused by the defendant's negligence, and the defendants having denied that charge, they were at liberty, under their general denial, to prove anything to show that the plaintiff's injuries did not result from their negligence. ¹¹⁹ That which can be proved under the general denial already pleaded, is improper to be specially pleaded.

If the pleader intended to say that to ride in that position was so dangerous that injury to the plaintiff could not have been avoided by the exercise of the care incumbent on the carrier, and that the fact that it was so dangerous was obvious or known to the plaintiff, then the fault of the plea is that it does not say that, and, in the light of the evidence, if it had said so the court would not have committed error in ignoring it in the instructions, because there was no evidence to support it. All the evidence shows that the accident would not have occurred if the motorman had used even ordinary care.

If by that plea it was intended to say that the plaintiff's negligent act of riding on the step joined with the defendant's negligent act of attempting to pass two cars in a space that was not wide enough for them to pass in safety, and that thus the plaintiff contributed to cause his own injury, that defense was already covered by the plea of contributory negligence.

But if it was intended by the plea to say that the plaintiff by voluntarily taking that position released the defendants from their duty to exercise the degree of care due from the carrier to the passenger, or if it was intended to say that by taking that position the plaintiff assumed not only the risk incident to it but assumed also the risk of the defendant's negligence, then

it was not a good plea. The passenger never assumes the risk of the carrier's negligence.

There is always a risk of personal injury to a person traveling, even if there be no negligence either on his own part, or on the part of the carrier. That risk is incident to the act of traveling, and is greater or less according to the circumstances and conditions. That risk the passenger assumes. But if to the danger incident to the act of traveling under the circumstances and ¹²⁰ conditions of the particular case, is added a danger caused by the negligence of the carrier, the passenger does not assume the risk of those combined dangers. If the catastrophe in question did not result alone from the danger incident to the act of traveling, under the given circumstances and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of the risk as would relieve the carrier from liability.

Assumption of risk is one thing and contributory negligence is another: *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167. The court did not err in ignoring that plea in its instructions.

Instruction numbered 3 given for the plaintiff begins as follows: "The jury are instructed that if you believe and find from the evidence in this case that the servants of defendant St. Louis and Meramec River Railroad Company, who were in charge of its said east-bound car on the occasion mentioned in the evidence, prior to and at the time of the alleged injury to plaintiff, were not exercising ordinary care to avoid said collision," etc.

Appellants complain of this instruction because they say that by the use of the words "said collision," it assumes that there was a collision, instead of submitting the question to the jury. There was no dispute on that point. The evidence of defendants showed that there was a collision, as well as that of the plaintiff. Although the general denial put every fact stated in the petition in issue, yet a fact about which there was no real dispute, and that was conceded at the trial, may be assumed in an instruction. The defendants asked five instructions, marked B, C, D, E and F, the effect of which were that the plaintiff by taking the position of obvious danger on the step of the platform was not entitled to recover. From what we have above said it ¹²¹ will appear that there was no error in refusing those instructions.

Instruction G asked by defendant was to the effect that if the Meramec car at the moment of the accident was not passing through the curve, the verdict should be in favor of the Meramec company. That instruction called for a verdict for that defendant even though the Meramec car had stopped after it had entered the curve, as some of the evidence tended to show, at a point where the danger was greatest. It was not error to refuse that instruction.

3. It is earnestly argued that the damages awarded by the jury are excessive.

We do not deem it necessary in this opinion to discuss the evidence bearing on this point. It is sufficient to say that the assessment by the jury is not so much out of the way as to justify us in invading their peculiar province. There is nothing to indicate that it is not the result of calm judgment, and we will not disturb it.

We find no error in the record and therefore the judgment is affirmed.

All concur.

The Duty and Liability of Street Railway companies to passengers taking dangerous positions on their cars are discussed in Watson v. Portland etc. Ry. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699, 44 L. R. A. 157; Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 68 Am. St. Rep. 723, 40 Atl. 645, 41 L. R. A. 836; Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. St. 521, 88 Am. St. Rep. 827, 51 Atl. 324; Thane v. Scranton Traction Co., 191 Pa. St. 249, 71 Am. St. Rep. 767, 43 Atl. 136; Reber v. Pittsburg etc. Traction Co., 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. Rep. 599, and cases cited in the cross-reference note hereto. In a recent Michigan case it is held contributory negligence, as a matter of law, for a passenger on a freight train to take a loose chair near an open door in the caboose, instead of a fixed seat provided for passengers, when he knows that the train is being made up: Freeman v. Pere Marquette R. R. Co., 131 Mich. 544, 100 Am. St. Rep. 621, 91 N. W. 1021.

Am. St. Rep. Vol. 101—23

JONES v. KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY.

[178 Mo. 528, 77 S. W. 890.]

PLEADING—Waiver of Defects.—A defect appearing on the face of the complaint can be reached only by demurrer, unless it affects the validity of the cause of action, rendering the complaint insufficient to support the cause of action, and then it can be neither waived nor cured, and can be brought up on motion to arrest judgment, or during the trial. All other defects in the complaint can be waived and are deemed to have been waived unless brought to the attention of the court by demurrer, and unless, if the demurrer is overruled, the defendant declines to plead to the merits. (pp. 438, 439.)

APPELLATE PRACTICE—Review of Demurrer.—The complaint, the demurrer, and the judgment of the court on the demurrer, constitute a part of the record proper, and such judgment is reviewable without exception, but a motion for a new trial relates to matters only that are preserved by the bill of exceptions. (p. 439.)

ACTIONS—Unnecessary Party.—An unnecessary party to an action may be dropped at any time without affecting the rights of necessary parties and the presence of the unnecessary party in the case is not ground for a reversal of the judgment. (p. 440.)

ACTIONS—Unnecessary Parties.—If a statute declares that a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted, the joining of such beneficiary, if not forbidden by statute, is unnecessary, but not fatal to the action. (p. 442.)

ACTIONS—Unnecessary Parties—Construction of Statute.—If a statute creates a liability against a railroad company for damages due to any of its employes arising out of the negligence of its agents, and declares that the amount recovered shall inure to the exclusive benefit of the widow and children of the deceased employé, and if he is not a resident of the state, that suit may be maintained by the widow, such statute makes the widow the trustee of an express trust, and suit may be maintained by her alone for the benefit of herself and her children, the joining of such children as parties plaintiff, though unnecessary, is not a fatal defect to the maintenance of the action. (p. 442.)

ACTIONS—Parties—Suit for Infant.—If suit is prosecuted for an infant, it must run in the name of the infant, as plaintiff, by its guardian or next friend, and not in the name of the guardian or next friend for the infant. The infant is the real plaintiff. (p. 442.)

MASTER AND SERVANT—Assumption of Risks—Negligence.—An employé operating a locomotive on a railroad assumes the ordinary risks incident to that business, and if injured through an accident incident to such business, without fault of the company, cannot recover. (p. 442.)

MASTER AND SERVANT—Negligence—Evidence.—Proof of the mere fact that a servant was injured in the master's service is not sufficient to make out a prima facie case for his recovery. (p. 442.)

RAILROADS—Negligence—Assumption of Risks—Burden of Proof.—Danger of a collision by a regular railroad train with cars running loose, and unattended from a sidetrack to the main track,

is not one of the ordinary risks incident to the business of engineer in charge of the train on the main track, and in such event the burden of proof is on the railroad company to explain the cause of such collision and resulting injury to the engineer. (p. 443.)

RAILROADS—Negligence—Fellow-servants.—An engineer in charge of a regular railroad train on a main track is not a fellow-servant with other employés of the company, intrusted with the duty of preventing loose cars from escaping from the sidetrack to the main track in an ordinary storm by putting brakes on or blocking them to prevent their escape. (p. 443.)

RAILROADS—Negligence—Loose Cars—Burden of Proof.—If loose and unattended cars run on to a main railroad track imperiling the life or safety of an engineer in charge of a train on the main track, and in the due performance of his duty, it must be presumed that the company did not exercise reasonable care to prevent its loose cars from escaping, and the burden of proof is on it to explain the situation, and to show that it performed its duty in endeavoring to prevent such loose cars from escaping. (pp. 443, 444.)

RAILROADS—Negligence—Maintenance of Derail Switch.—The fact that a railroad company does not maintain a "derail" switch to prevent loose cars on a sidetrack from escaping onto the main track is not per se negligence. The law imposes upon the railroad company only reasonable care in such case, and does not require it to furnish absolutely safe or even the best known appliances. (pp. 446, 447.)

RAILROADS—Negligence—Obvious Danger—Assumption of Risks.—The fact that a railroad company does not maintain a "derail" switch on a sidetrack to prevent loose cars thereon from escaping onto the main track, is not such an obvious danger as to constitute it negligence for an engineer in charge of a regular train running on the main track to continue in the service of the company after knowledge of the absence of such "derail" switch. (p. 447.)

RAILROADS—Negligence—Failure to "Fasten and Secure" Cars.—An instruction authorizing a recovery for an injury to a railroad employé caused by the escape of loose cars from a sidetrack to the main track, if the railroad company "negligently failed and omitted to fasten and secure said cars on said switch or sidetrack, and that by reason of said negligent failure and omission said cars escaped from said sidetrack," is not open to the objection that the words "fasten and secure" imply the duty of making such cars absolutely incapable of getting loose or escaping. (p. 448.)

RAILROADS—Negligence Causing Death—Measure of Damages.—An instruction that the measure of damages against a railroad for negligently causing the death of its employé is all of the wages that he would probably have earned during the period of his life expectancy, is objectionable as authorizing too great a recovery, but is not ground for reversal when the jury does not return an excessive verdict. (p. 451.)

L. F. Parker and Pratt, Dana & Black, for the appellants.

W. Moore and J. A. Reed, for the respondents.

⁵³⁴ VALLIANT, J. David R. Jones, who was the husband of the plaintiff Mary and the father of the infant Mary, was a locomotive engineer in the service of ⁵³⁵ the defendant and

was killed in a railroad accident at La Cygne, a station on defendant's road in the state of Kansas, which accident was caused, as plaintiffs allege, by the negligence of the defendant. The right of action is based on the following statutes of Kansas: Paragraph 1251 of the General Statutes of Kansas of 1889, as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage."

Also section 422 of chapter 80 of the Laws of 1868, known as paragraph 4518, General Statutes of Kansas of 1889, as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Also paragraph 4519 of the General Statutes of Kansas of 1889, also designated as section 422a as follows: "Be it enacted by the legislature of the state of Kansas, that in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80 of the Laws of 1868, is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The plaintiff is Mary Jones, the widow, suing in ⁵³⁶ her own right, and the same Mary in the capacity of next friend, duly appointed, suing in behalf of the other Mary, an infant five years old, the only child of the deceased.

The negligence charged in the petition is that the defendant placed on its sidetrack at La Cygne three freight-cars and negligently failed to perform its duty in that connection in the following particular, viz., to fasten and secure the cars on the sidetrack; to keep the brakes properly set and the cars properly blocked; to provide the cars with sufficient brakes in

good order to hold them in place; to provide the ends of the sidetrack with safety or derail switches or other devices of the kind usually provided by railroads at such places and in common use at such places to protect the main track from loose cars and to prevent cars when not under control from passing from the side track to the main track. The petition states that in consequence of this failure of duty on the part of the defendant, the three freight-cars mentioned were suffered to escape from the sidetrack and run loosely and unattended to and upon the main track, where they came into collision with the locomotive engine which the plaintiff's husband was operating, drawing a freight train, and in consequence thereof he received injuries of which on the next day he died.

The answer of the defendant was: 1. A plea that the infant Mary was not a proper or necessary party to the suit; 2. A general denial; and 3. A plea of contributory negligence, to which was a reply of general denial.

Upon the trial the plaintiff made the formal proof of her appointment as next friend of the infant and that she was the widow, and the infant the only child of the deceased. Concerning the accident the testimony for the plaintiff tended to show as follows:

At La Cygne the defendant's road runs north and south. On a sidetrack at that station, on the evening ⁵³⁷ of June 25, 1897, there were several freight-cars stationed. Of these the one farthest south was a coal-car loaded with ties, next north after a space of two hundred or three hundred feet was a stock-car, and attached to it on the north end was a box-car. From the north end of the switch to a point beyond where the box-car and stock-car stood it was slightly upgrade. From the stock-car to the coal-car it was nearly level; beyond the coal-car to the main track it was slightly downgrade, and the main track was downgrade from the end of the switch to the place of the accident. Between 8 and 9 o'clock on the evening of the day named, a storm of wind, rain and hail came from the northwest, which drove the three cars down the sidetrack, out on the main track, and down it for a distance of a mile, at which point a locomotive drawing a freight train going north came forcibly in collision with the coal-car and caused a wreck of the engine. The plaintiff's husband who was the engineer in charge of the locomotive received severe injuries, of which he died the next day. It was a dark night; the engine was running at the usual rate facing the wind and rain.

The train was running on its schedule time, and had the right of way; the deceased was in the discharge of his regular duty. It was a severe but not an unprecedented storm; the damage done by it in and around the station was not serious. No houses or trees were blown down. Storms as severe were not so unusual in that vicinity as to be beyond expectation. This switch track was not equipped with what in the testimony was called a "derail switch," although a considerable number of sidetracks of defendant along that part of its road between Fort Scott and Kansas City did have that equipment. A "derail switch" is a device which when set will cause a car running loose on the sidetrack to run off its rails to the ground before reaching the main track, and it is contrived to prevent accidents of this kind. The testimony for plaintiff also tended to show that the brakes were not set on the ⁵³⁸ three cars that escaped and that they were not blocked or otherwise fastened. These three were the only cars of those on that sidetrack that night that were driven out by the storm.

The testimony for the defendant tended to prove that the three cars in question were supplied with good and sufficient brakes; that the brakes were set, and that as set, they afforded all the security required for holding the cars in place under ordinary conditions or conditions that might reasonably be anticipated. That the storm was of such unusual force that it could not have been reasonably anticipated. That the device called the derail switch was not usually used in sidetracks level or nearly so, as this was, but only where the grades were steep. That a derail switch was not only not necessary but not desirable in a sidetrack like this; that such a switch had its own difficulties and drawbacks, which rendered its usefulness in the long run questionable.

The case was given to the jury under instructions which will be hereinafter discussed. The trial resulted in a verdict and judgment for the plaintiff for five thousand dollars. The defendant appeals.

1. It is assigned as error that the minor child of the deceased was not a proper or necessary party. There was a demurrer to the petition on that ground, which was overruled, whereupon the defendant filed an answer in which it set up the same objection to the petition. The defect, if it was such, appearing on the face of the petition, could be reached only by demurrer, unless it was such a defect as affected the validity of the cause of action, rendering the petition insufficient to

support a judgment, in which case the defect could be neither waived nor cured, but could be brought up on motion in arrest or during the trial. But if it was not a defect fatal to the right of recovery, if it was one that could be waived, it will be deemed to have been waived unless it was brought to ⁵³⁹ the attention of the court by demurrer, and unless, if the demurrer was overruled, the defendant declined to plead to the merits. Pleading to the merits after such a demurrer is overruled waives the right to complain of the ruling. The insertion in the answer of a clause which was only a repetition of the demurrer, did not avoid the effect above stated of answering over. Nor can that consequence be avoided by inserting in the motion for a new trial, as was done in this case, that the court erred in overruling the demurrer. The petition, the demurrer and the judgment of the court on the demurrer, constitute a part of the record proper, and that judgment is reviewable without exception, whereas the motion for a new trial relates to matters only that are preserved by the bill of exceptions. Unless, therefore, the alleged defect of parties in this case is of such a nature as to defeat the right of action, the point is not properly before us for review.

The defect as stated in the demurrer and in the answer is, that the infant Mary Jones "is not a proper or necessary party." If she is merely an unnecessary party, she may be dropped at any time (Patterson's Missouri Code Pleading, 956, 1001; Powell v. Banks, 146 Mo. 620, 48 S. W. 664), without affecting the rights of the other plaintiff who is a necessary party. There is no obscurity in the meaning of the term "not a necessary party"; it means that the suit can proceed just as well without her, and in that event, if her presence has the effect to hinder or burden the case, she may be dropped. But the meaning of the term "proper party" is not so clear. The word "or" which the pleader has here used, may be used in two forms. In one it corresponds to either, and in that sense the term "proper or necessary" would mean "either proper or necessary"—that is, one or the other. In the other form it means to express the same thing alternately in different words; in that sense the term "not proper or necessary" would imply that it was not proper—that is, not necessary. The latter is ⁵⁴⁰ probably the sense in which the pleader used the term; if it is not used in that sense then there is nothing to show what was meant by saying that the infant was not a proper party. If she was merely an unnecessary party, her

presence in the case is not such a defect as would justify a reversal of the judgment.

Appellant takes the position that the infant cannot maintain the suit because the Kansas statute does not confer on her the right of action, and that the widow alone cannot maintain it because she is not alone entitled to the proceeds. To sustain this position, appellant relies on *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553, 73 S. W. 586.

In that case it was held by this court that the liability created by a statute of Illinois, similar in character to that created by the Kansas statute with which we are now concerned, could not be enforced in this state at the suit of one who was not authorized by the statute of Illinois to maintain the suit. The Illinois statute conferred the right of action on the personal representative—that is, the executor of the will or administrator of the estate of the deceased—and it was held that the liability and the right of action, being created by statute, only the person to whom the statute gave the right could maintain the suit, and if, as in that case, the foreign statute gave the right to one whose authority extended not beyond the limits of his state, he could not sue here. It was also held in that case that our statute, section 548 of the Revised Statutes of 1899, which undertook to authorize the appointment of a person in this state, other than the person specified in the foreign state, to maintain the suit, was invalid.

The Kansas statute, however, on which this suit is based, differs in the feature we are now considering from the statute of Illinois. The Kansas statute declares the liability, gives the right of action to the personal representative of the deceased, specifies that the damages to be recovered shall inure to the exclusive ⁵⁴¹ benefit of the widow and children, or next of kin, and then provides that where the deceased is not a resident of the state, the suit may be maintained by the widow, or, if there is no widow, then by the next of kin. The right of the widow, therefore, to maintain this suit is in line with the law laid down in *McGinnis v. Missouri Car etc. Co.*, above mentioned. The damages to be recovered are to inure, according to the express terms of the statute, to the exclusive use of the widow and children or next of kin. Therefore, when the administrator sues and recovers, he does so, not for the use of the estate in general, but for the use of the beneficiaries named; he is, in effect, created by the statute a trustee of an express trust for the use of the widow and next of kin. And if there is no ad-

ministrator, or if the deceased was not a resident of Kansas, the widow may sue. But when she sues and recovers it is not for her own use alone, but for the use of herself and the children or next of kin; she thereby becomes the trustee of an express trust, so created by the statute which created the liability.

It is argued in behalf of appellant that although the widow, by the law of Kansas, may sue alone, yet by force of our statute, section 547 of the Revised Statutes of 1899, she cannot do so because she is not alone entitled to that which may be recovered. The language of our statute is: "Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state, by the person or persons entitled to the proceeds of such cause of action: Provided such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued."

That statute was intended to aid a resident of this state in availing herself of the provisions of the foreign statute, and it should be construed as an enabling, not as a disabling statute. It was intended to confer a right, not to restrict one; if by the law of Kansas the widow ⁵⁴² had the right, our statute was not designed to take it from her. This construction renders that section of our statute in harmony with section 541 of the Revised Statutes of 1899, of our practice act, which provides that a trustee of an express trust may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. But whilst a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted, he is not forbidden to join the beneficiary, and if he does so, the most that can be said in criticism of the act is that it was unnecessary.

In the case at bar, the widow and her child were the sole beneficiaries of the suit, so declared by the Kansas statute, and by the same statute the widow was authorized to sue and recover for the benefit of herself and her child. She might have sued alone, as trustee of the express trust, using apt words to show her authority, and if she has joined the child with her in the suit, it was a useless act, but it has impinged no one's rights.

Strictly construing the petition herein, the child has not been made a party to the suit. When a suit is prosecuted in the name of an infant, it must run in the name of the infant as

plaintiff by its guardian or next friend, and not in the name of the guardian or next friend for the infant. The infant is the plaintiff, not the guardian or next friend. An executor or administrator sues in his own name because the title is in him, but the title to the infant's property or choses in action is not in the guardian or next friend, but in the infant. In this case, if the infant was a necessary party, the petition would be subject to criticism, because the plaintiffs are named in the petition as Mary Jones for herself and the same Mary as next friend to the child, the legal effect of which, when taken with the other averments of the petition, is, that the plaintiff is Mary Jones as widow, suing for herself, and the same Mary suing as trustee of an express trust for her child. The statute of ⁶⁴³ Kansas gives her the right to sue in that capacity and our statute does not abridge that right.

2. The refusal by the court of the instructions asked in the nature of a demurrer to the evidence is assigned as error.

As the foundation for their theory on this branch of the case, the learned counsel for appellant state three propositions, viz., that the burden is on the plaintiff to prove: 1. Negligence on the part of the defendant; 2. The specific negligence charged; and 3. That the negligence was the proximate cause of the injury; and to these, they add that, in the beginning, the plaintiff is met by the presumptions: 1. That the master has performed his duty; and 2. That the catastrophe was the result of the usual and ordinary hazards incident to the business, the risk of which the servant assumed when he entered into the service. The proposition that the burden is on the plaintiff to prove his case is conceded, and that the presumption is in the defendant's favor in the beginning, follows as a corollary. It is also beyond dispute that there are dangers incident to the business of operating a locomotive on a railroad, even when the business is conducted with due care on the part of both master and servant; that of such dangers, the servant assumes the risk, and if he is injured through an accident that is incident to the business, without fault of the master, he cannot recover. Proof, therefore, of the mere fact that the servant was injured in the master's service is not sufficient to make out a *prima facie* case for the plaintiff. To that extent, the authorities cited in the brief for appellant sustain those propositions: *Yarnell v. Kansas City etc. Ry. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Murphy v. Wabash Ry.*, 115 Mo. 111, 21 S. W. 862. But when cars are found running

loose and unattended on the main track at a time and place when and where they are liable to cause the wreck of a regular train, it cannot be said that the danger so incurred is one of the usual and ordinary hazards incident to the business. It is not a usual ⁵⁴⁴ and ordinary occurrence in a prudently managed business for cars to be found running loose in that manner; it does not ordinarily occur unless some one has neglected his duty, and it is not, therefore, a risk assumed by the servant. And since it is an occurrence not likely to happen in the orderly course of business, when it does happen and a servant is injured in consequence, it calls for an explanation. Upon whom does the burden of making the explanation devolve? It devolves either on the injured servant or on the master. If it was the duty of the injured servant to attend to those cars, on the sidetrack, to see that they did not escape, then the burden of making the explanation devolved upon him. But if he had nothing to do with securing the cars in their position on the sidetrack, if his duty related only to the operation of the locomotive engine, then there is no explanation due from him.

The question of the negligence of a fellow-servant does not enter into this case, because, as was shown by the pleadings and proof, the statute law of Kansas makes the railroad company liable to a servant for the consequences of the negligence of a fellow-servant. But, even at common law, the negligence charged in this case was not the negligence of a fellow-servant. It is the master's duty to furnish the servant reasonably safe appliances and a reasonably safe field of operation. This duty, of course, in an extensive business, the master cannot attend to in person, but must intrust to servants, but the servants to whom it is intrusted act in the master's place and perform his duty; and if they are negligent, it is his negligence. It is necessary to observe a distinction between the performance, on the one hand, of the work for which the business is undertaken, and the furnishing, on the other, of the appliances and field of operation with which and in which to do the work; in the one, the servants are working for a common master; in the other, the master, either per se or per alium, is performing his duty to his servant. And whether ⁵⁴⁵ he acts per se or per alium, if he fails to exercise reasonable care, he is negligent.

It was the duty of the master in this case to use reasonable care to prevent those cars escaping, and, therefore, when they

were found running loose, so as to imperil the life of the servant who was in the due performance of his duty, the presumption is that the master did not use reasonable care to hold his cars on the sidetrack, and the burden is on him to prove that he performed his duty in this respect; it devolves on him to explain the occurrence.

It was not attempted, on the part of the defendant, to prove that cars with good brakes and the brakes properly set, were liable to escape under conditions that might reasonably be anticipated. On the contrary, when confronted with the fact that the sidetrack was not equipped with a derail switch, the defendant offered testimony to prove, and now contends, that with good brakes and the brakes properly set, the cars were secure under ordinary conditions. But if the brakes were not set or the cars blocked, they were liable, under ordinary conditions, to do just what these cars did; therefore, when it was shown that they did escape, the presumption arose that there was something wrong, either with the brakes or their setting. The defendant, to meet this presumption, undertook to prove that the cars, although the brakes were set, were driven out by a storm of such extraordinary force that it was not to have been reasonably anticipated. If that was the fact, the plaintiff was not entitled to recover (*Stoher v. St. Louis etc. Ry. Co.*, 105 Mo. 192, 16 S. W. 591; *McPherson v. St. Louis etc. Ry. Co.*, 97 Mo. 253, 10 S. W. 846; *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808), and the jury were so instructed.

That there was a severe storm on that occasion is shown by the evidence on both sides, and that these cars were moved out by the wind is a natural inference. Whether the wind was strong enough to have moved them if the brakes had been set was an open question. ⁵⁴⁶ That it was an unprecedented storm, even the evidence of the defendant can hardly be said to prove; that it was a storm of such unusual violence as that it could not have reasonably been anticipated by one whose duty it was to take measures to guard against storms, is a fairly debatable proposition under the evidence. There were no substantial buildings or large trees blown down. The photographs, which defendant put in evidence, which were taken shortly after the storm, show little, if any, effect of the wind. There was evidence to the effect that storms of as great force, though not frequent, were to be expected, and that sometimes storms of greater severity had occurred in that vicinity. There was a

reference by one of defendant's witnesses to a cyclone cellar, to which his thoughts turned when this storm arose, but to which he did not find it necessary to go, on this occasion. The reference only goes to show that a cyclone cellar was a contrivance not unknown to people in that vicinity. Although the storm was severe, yet if it was such a storm as common experience taught people in that vicinity to expect, it was the duty of the defendant to have expected it and to have made reasonable provision to guard against its effects. The testimony as to the force of the storm and as to its being the cause of the accident was conflicting. So far as the questions relating to the force and effect of the storm were involved, the case was given to the jury under the following instruction: "If you believe from the evidence that the cause of the cars being on the main track was an unusually violent storm, and that, if there had not been such a storm they would not have run out, then the defendant was not in law at fault for their being there, and, without regard to other questions in the case, you should find your verdict for defendant."

That instruction presented that feature of the case to the jury in at least as favorable light as defendant could have asked. After the verdict of the jury, under that instruction, the defendant has no right to ask an ⁵⁴⁷ appellate court to say that the cause of the accident was an unusually violent storm unassisted by any negligence of the defendant.

On the charge in the petition, that the brakes were not set, the testimony was conflicting. Appellant argues, in reference to this feature of the case, as though the only evidence in support of the charge was that by one witness who testified that as he passed the coal-car which was loaded with ties, he tested the brake by giving it a kick with his foot, and discovered that it was loose. This, he said, he did from force of habit, having formerly been in the railroad business and accustomed to apply that test in his inspection of cars to see if the brakes were set. We infer from the testimony of one of the defendant's witnesses that it was not an unusual manner of examining the brakes; he testified that he kicked a brake on one of these cars in passing, and thereby found it firmly set. But that was not the only nor was it the best evidence that the brakes were not set. The fact that the cars went out by the force of a wind which the jury found was not sufficient to have drawn them out if the brakes had been set, tends to show that they were not set.

The defendant's testimony tended to show that this coal-car was loaded with ties about 3 o'clock in the afternoon, and left on a part of the sidetrack which was nearly level, and that before leaving it the foreman set the brakes. It was later in the afternoon or evening, probably 7 or 8 o'clock, when, according to the plaintiff's witness, he kicked the brake and found it loose.

The defendant's testimony in reference to the brake on the two other cars was not so positive: One witness passed within a few feet of them and looked at them as he passed, and the brakes seemed to be set. He did not get on the cars or touch the brakes. Another witness testified that he came in on a freight train that afternoon and as they had to leave some cars on the sidetrack, ⁵⁴⁸ it became necessary to shove these two cars which were then standing farther north, to the position in which they were finally left, and they did so. He testified that the two cars were coupled together; that the brake on the south end of the north car was set; that the cars were shoved by the train without first loosening the brake, and that the brake held the wheels on one end of the car so that they did not turn. He left the cars in that condition, so that, according to his testimony, there was but one brake set on those two cars when he left, and there was no evidence that anyone set the brakes after he left. According to this witness, those two cars were switched or shoved by the train with that brake set, and they were left without any further setting.

One of defendant's expert witnesses, referring to the loaded coal-car, said, that a jar such as would be made by the two other cars coming against it, would be apt to loosen the brake on the coal-car. It is just as reasonable to infer that the jar these two cars received in switching would loosen the one brake which was set. That was the substance of the defendant's testimony as to the setting of the brakes on those two cars, and it was far from convincing. At best, there was only one brake set, and that had been subjected to the shock incident to switching. If the jury reached the conclusion that the brakes were not properly set on those two cars, we can find no fault with their verdict. Those two cars were empty cars. They presented to the wind a broad surface and were comparatively easily moved, and coming with the force of the wind against the loaded coal-car, even if the brakes on the latter were set, would probably loosen them, and, as the grade was from that point down, the cars would easily move down the track.

The fact that there was no derail switch there was not per se negligence, and it was not so treated by the court. Since the law imposes on the master no higher degree of care than that which it denominates reasonable, it does not require him to furnish absolutely safe or even the best ⁵⁴⁹ known appliances. Yet when his conduct in this respect is on trial, it is proper for the jury to know what appliances are in common use in that kind of business. It has been said by a very high authority that in the operation of a dangerous business, the master is guilty of negligence if he fails to furnish the best, well-known and reasonably attainable implement: *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39 L. ed. 464. We do not understand that case as laying down any stricter rule in reference to the master's duty in that respect than that he was to do all that a reasonably prudent master, mindful of the dangerous character of his business, would ordinarily do to protect the lives of his servants. That is the law in this state.

We do not, therefore, say that the defendant in this case was negligent because the sidetrack was not equipped with a derail switch, although it is quite plain that if it had been so equipped this accident would not have occurred. And before passing this point, we may as well say now (since it is the only foundation for the plea of contributory negligence) that the maintaining of the sidetrack without the derail switch was not such an obvious danger as to authorize the court to pronounce the act of the locomotive engineer in continuing in the service negligence as a matter of law. If the danger was not obvious to the master, it was not obvious to the servant. Therefore, as it affects both the master and the servant, the question of whether the sidetrack without the derail switch was a reasonably safe appliance was a question for the jury. If the master, in the exercise of his right to choose between two appliances, chooses the one less safe, the fact should make him the more careful to properly use the one he selects.

Under the evidence in this case, the trial court did right in refusing the instructions looking to a nonsuit.

3. Appellant complains of the following language in instruction 1 given for the plaintiff: ⁵⁵⁰ "The court instructs the jury that if you believe and find from the evidence that . . . on or about said date the defendant placed or had on its switch or sidetrack at La Cygne, Kansas, three certain freight-cars and negligently failed and omitted to fasten and secure said cars on said switch or sidetrack, and that by reason of said

negligent failure and omission, if it was negligent, said cars escaped from said sidetrack, etc., then your verdict should be for plaintiffs."

The objection is to the words "fasten and secure," and it is argued that these words imply the duty of making the cars absolutely incapable of getting loose. Even standing alone, the instruction would not have been liable to the meaning. The greater part of the evidence for both plaintiff and defendant related to the subject of fastening and securing the cars on the sidetrack by means of brakes and blocks. It was shown that sometimes, when brakes were not considered sufficient, blocks were used, but when the brakes were sufficient, blocks were not used. All the fastening or securing that the jury had heard about was by means of brakes and blocks, and they could not have interpreted the instruction as meaning that it was the duty of the defendant to have anchored the cars with chains. The instruction uses the term "negligently failed," and it was followed by an instruction defining the word "negligent." Another instruction for plaintiff distinctly told the jury that the defendant was not bound to use any particular device to prevent the cars from escaping, but only reasonable and ordinary care, taking into consideration appliances and means in common use. The instruction given at the request of defendant also made it impossible for a jury of ordinary intelligence to have given the interpretation to the words "fasten and secure" that appellant apprehends was given them. Those instructions, on this point, were to the effect that the jury must not look to any one instruction alone, but all the instructions were to be taken together; that they ⁵⁵¹ must look to the evidence alone for the facts; that the defendant did not owe its servant any duty to make his surroundings absolutely safe, but, in that respect, to use only "such care as a reasonably careful employer would use in regard to the place where and the appliances with which he had to work. And so, if you believe from the evidence that defendant used such care with regard to its tracks and cars, and that, in spite of it, the collision took place, there was no one in law to blame therefor, and your verdict must be for the defendant." We discover no error in plaintiff's first instruction.

Appellant, in its brief, says that the second instruction for plaintiff is erroneous, but does not specify the particulars in which it is so, and we perceive none.

The third instruction for plaintiffs is complained of because it says: "And in determining whether it [the defendant] did use reasonable and ordinary care in that regard, you may take into consideration the appliances and means, if any, which were adopted and in common and general use at the time for that purpose, at similar places, by prudently and properly conducted railroads."

The argument is that there was no evidence tending to show that there was any appliance in general use which was not in use by the defendant at this place. The evidence for the plaintiff tended to show that it was no unusual occurrence for cars to be blocked on a sidetrack; that evidence was answered by the defendant with evidence tending to show that when the brakes were good and well set and the track level, blocks were not ordinarily used. On the part of the plaintiff, the evidence tended to show that derail switches were in common use on this and other railroads; this evidence was met by the defendant with expert evidence tending to show that such switches were not used when the sidetrack was as nearly level as this was, and that they were of questionable utility anyway. The court would have been compelled to have usurped the province of the jury, ⁵⁵² and have decided those questions of fact in the defendant's favor, before it could have refused the plaintiff's third instruction. It is also contended that the instruction was erroneous in omitting to call the jury's attention to the risk assumed by the servant when he went into the business. There was nothing in the evidence on which to predicate a hypothesis that the accident was the result of a condition ordinarily incident to the business, unaided by the negligence of the master.

The storm theory was the only real defense in the case. If the storm was not of such unusual violence that it could not reasonably have been anticipated and its effects guarded against, then, the cars would not have been found running wild, unless the ordinary precautions to hold them in place had been neglected. There was evidence tending to show that the accident resulted from the effect of such an unusual storm, and the jury were instructed, in very clear language, to render their verdict for the defendant if they found that to be the fact. And, in another equally explicit instruction, the jury were told that if the death of the plaintiff's husband resulted from one of the ordinary perils incident to the business, she could not re-

cover. Appellant has no cause to complain of the third instruction.

The instruction as to the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiffs you should, in assessing their damages, assess the same with reference to the pecuniary loss, if any, sustained by the wife and child of the deceased: 1. By fixing the same at such sum as you may believe and find from the evidence would equal the probable earnings of the deceased, taking into consideration his age, business capacity, experience, habits, health and energy, during what would probably have been his lifetime, if he had not been killed; 2. By adding these to the value of his services in the attention to and care ⁵⁵³ of his family and the education of his child, in all not to exceed the sum of ten thousand dollars."

It is complained of that instruction that it gives, as the measure of damages, all the wages that the deceased would probably have earned during the period of his life expectancy, without taking into consideration natural contingencies, and without considering that part of his earning at least would not necessarily or naturally have been given to his wife and children. The instruction is liable to that interpretation, although in the first part of it the jury are told that they must assess the damages with reference to the pecuniary loss, if any, sustained by the wife and child. Reading all the clauses of the instruction together, they may be construed to mean that the jury are to calculate from the evidence the probable amount of earnings of plaintiff's husband if he had lived the full period of his life expectancy, then to estimate how much of that amount would probably have inured to the benefit of the wife and child and to that add the pecuniary value of the husband's and father's personal service in the care, maintenance and rearing of his family. But since the instruction as given is liable to the construction appellant puts upon it, we cannot give it our approval for a precedent. The evidence showed that the plaintiff's husband's life expectancy was thirty-two years, and that he was, at the time of his death, earning fifteen hundred dollars a year. At that rate, he would have earned in the full period of his life, over forty thousand dollars. The plaintiff was not entitled to all the wages her husband, on that basis, would have earned. It was proper for the jury to take into account what he was earning, his capacity to earn, and probable

duration of his life, but they ought also to take into account the contingencies to which his life was subject and estimate as best they could from the evidence how much of his earnings would probably have inured to his wife and child, and what the pecuniary value of his services to them would have been. Of course, the estimate on either of ⁵⁵⁴ these points must, to a great extent, partake of the nature of conjecture, but as we have no more certain means we must make the wisest use we can of the means we have.

But although we cannot approve the instruction, we do not feel justified in reversing the judgment on that account, because it is very apparent that the jury did not put on it the construction appellant does, since they rendered their verdict for only five thousand dollars, when, under the instruction they were at liberty to assess the damages as high as ten thousand dollars, that being the limit of the Kansas statute. No one can say, under the circumstances of this case, that five thousand dollars was too much for the loss of the husband and father of this family.

We are expressly forbidden by statute to reverse a judgment for an error not "materially affecting the merits of the action": Rev. Stats. 1899, sec. 865.

The court refused several instructions asked by defendant, and the refusal of them is assigned as error. But what we have already said expresses our views on those instructions, and discussion of them would be, in the main, a repetition of what has gone before.

There was no error in admitting evidence that derail switches were in use in other sidetracks on this road, nor in admitting in evidence the printed rules of the company regarding the precautions to be taken to prevent cars escaping from a sidetrack.

On the whole record we find no error "materially affecting the merits of the action."

The judgment is affirmed.

Brace, Gantt and Fox, JJ., concur.

Robinson, C. J., Marshall and Burgess, JJ., concur in the result.

Tests to Determine Who are Fellow-servants are stated in the recent cases of *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 210, 70 N. E. 222; *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706, 69 N. E. 988; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535. As

to whether railway employes on the same train are fellow-servants, see *Brewster v. Chicago etc. Ry. Co.*, 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221; *Grattis v. Kansas City etc. R. R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721, 55 S. W. 108, 48 L. R. A. 399; notes to *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 32; *Mast v. Kern*, 75 Am. St. Rep. 608-613. As to whether railway employes on one train are fellow-servants with employes on another train, see *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222; notes to *Mast v. Kern*, 75 Am. St. Rep. 610; *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 32; *Fox v. Sandford*, 67 Am. Dec. 595. And as to whether switchmen are fellow-servants with trainmen, see the note to *Mast v. Kern*, 75 Am. St. Rep. 637.

The Doctrine of Assumption of Risks will be found discussed in the monographic notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886-900; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 314-321.

SCHUBACH v. McDONALD.

[179 Mo. 163, 78 S. W. 1020.]

INJUNCTIONS—Jurisdiction to Issue.—Courts of equity alone have power to issue injunctions, and they never exercise this power to allay mere apprehensions of injury, but only when the injury is imminent and irreparable. (p. 459.)

INJUNCTION—Jurisdiction—Writ of Prohibition.—If the court has jurisdiction over the subject matter, it has the power to decide whether a petition for an injunction does or does not state a cause of action; and the mere failure of the petition to state a cause of action, or the defective statement of a good cause of action in no way affects the jurisdiction of the court, or justifies the issue of a writ of prohibition to prevent it from acting. (p. 459.)

INJUNCTION Against Ticket Scalping—Jurisdiction—Concrete Case.—A petition for an injunction against ticket brokers reciting that certain excursion tickets, mileage tickets and commutation tickets have been issued, or will be issued, from time to time by a railroad company, based upon a consideration of reduced rates, which by their express terms are to be good only in the hands of the original purchaser, and that it will be impossible, impracticable, or at any rate unbearably inconvenient, for the original purchaser to be identified and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride on such return ticket is the original purchaser or not; that it would be a fraud upon the railroad for anyone, except the original purchaser, to ride upon such return tickets, and a fraud for the original purchaser to sell such return tickets to the ticket brokers, and for such brokers to sell such return tickets to any third person to be by him so used, or upon the representation that they would entitle the buyer to so ride thereon; that, in the nature of things, the railroad could never ascertain that such frauds were about to be committed until after trains had departed and such tickets were presented to train conductors, and that it would then be too late to ask for or to receive injunctive relief against the perpetrators of such frauds, and that the ticket brokers are insolvent so that no adequate remedy at law could be had against them, and further, that even if such frauds

could be discovered in time to ask specific relief in each case, it would involve the prosecution of a multiplicity of suits, and praying for an injunction to restrain ticket brokers from buying, selling, or dealing in such nontransferable tickets, states a concrete case as to tickets then held by ticket brokers, and presents a live subject matter, between live parties, which gives the court power and jurisdiction to issue the injunction, and a writ of prohibition will not lie to prevent the court from acting and issuing such injunction. (p. 462.)

PROHIBITION, WRIT OF.—Office of.—A writ of prohibition can never be made to perform the functions of an appeal or writ of error, and lies only where a court, or tribunal clothed with judicial powers, acts in relation to matters over which it has no jurisdiction, or having jurisdiction over the subject matter, acts in excess of its jurisdiction. (p. 462.)

INJUNCTION Against Ticket Scalpers.—Petition to Confer Jurisdiction.—A petition by a railroad company for an injunction against a ticket broker to restrain him from dealing in special tickets, which recite upon their face that they are issued at reduced rates and are nontransferable, but which do not relate to any particular occasion, states a concrete case which a court of equity has jurisdiction to hear and decide, and a writ of prohibition will not issue against it. (pp. 464, 465.)

RAILROADS—Power to Issue and Affix Conditions to Special Tickets.—A railroad company may issue special tickets, based upon reduced rates, make them nontransferable, and valid only in the hands of the original purchaser, and such tickets may be limited as to time, or as to occasion, or they may be unlimited as to time or occasion and the original purchaser of such ticket cannot assign or transfer it, or any rights whatever thereunder, to any third person. (p. 466.)

RAILROADS—Rights Under Special Nontransferable Tickets. The purchaser of a special railroad ticket at reduced rates, nontransferable on its face cannot sell or transfer it to a third person to be used by him or another, and if he does the railroad company may invoke the aid of a court of equity to cancel the contract because of the fraud thus perpetrated, or if the ticket is used by another, it may sue for damages for a breach of the contract. (pp. 466, 467.)

INJUNCTION Against Ticket Brokers.—Ticket brokers who assert a right to buy and sell nontransferable railroad tickets, issued and to be issued, notwithstanding their terms, and notwithstanding the fact that the original purchaser can confer no rights upon anyone thereunder, thereby threaten to invade an existent property right of the railroad, which owing to the insolvency of the brokers and the nature of their business, will work irreparable injury to the railroad, and this entitles it to an injunction to prevent such brokers from so doing. (p. 469.)

INJUNCTION Against Railroad Ticket Brokers.—There is an existent controversy concerning a legal subject matter between live parties presented for adjudication and within the jurisdiction of the court, where a petition for an injunction, together with the return of the rule to show cause, show that defendant ticket brokers have in their possession and intend to buy, and assert a property right in nontransferable tickets issued by a railroad company, and sold or to be sold to such brokers by original purchasers and which such brokers threaten to sell to others. (p. 470.)

CONSTITUTIONAL LAW—Injunction Against Railroad Ticket Brokerage.—A court in granting an injunction restraining ticket brokers from buying and selling nontransferable railroad tickets, issued and to be issued, does not infringe upon the powers nor invade the province of the legislature. (pp. 470, 471.)

Judson & Green and H. W. Bond, for the petitioners.

G. P. B. Jackson, E. S. Roberts, Johnson & Richards and C. C. Allen, for the respondents.

175 MARSHALL, J. These are original proceedings against the defendant judges of the circuit court of the city of St. Louis, to prohibit them from further entertaining jurisdiction in certain injunction suits, pending before them in said court, wherein the railroads that are joined as defendants are plaintiffs, and the plaintiffs herein are the defendants. A preliminary rule was issued by one of the judges of this court, the defendants made return thereto, and the plaintiffs moved for judgment upon the pleadings.

The controversy is this: The defendant railroads have systems extending over a large portion of the United States and have termini in St. Louis. The plaintiffs herein are ticket brokers engaged in business in St. Louis. The railroads, each for themselves, instituted about fifty suits in the circuit court of St. Louis asking injunctions against the plaintiffs herein, and other ticket brokers in that city. The petitions are practically alike.

The substance of the averments of the petition is fairly stated by one of the counsel for the defendants to be as follows: "That in the year 1904 the Louisiana Purchase Exposition Company will hold a World's Fair at St. Louis, to which all of the nations of the world have been invited, ¹⁷⁶ to which 23,000 citizens have subscribed, and the federal government contributed \$5,000,000, the city of St. Louis \$5,000,000, the subscribers \$5,000,000, and the state of Missouri \$1,000,000, for a state exhibit. That various meetings and ceremonies will take place before and during the fair. That to enable the people to attend the fair and such meetings and ceremonies, excursion tickets will be issued from time to time; that they will attend in such large numbers that it is impracticable to secure their signatures to the return parts of the tickets. That for the same reason identification is impracticable.

"That in addition to these World's Fair tickets, said railroad, from time to time, issues nontransferable 'excursion' tickets,

'mileage' tickets and 'commutation' tickets below the regular one-fare rate for various meetings, assemblages and purposes. That such tickets are by their express terms, set forth therein, good for the transportation of the original purchaser alone and void in the hands of others. That by virtue of the terms of said tickets, if presented by one other than the original purchaser, the conductor must lift the same. That the sale of such nontransferable tickets, where they are interstate, is forbidden by the interstate commerce law, and where within the state, is forbidden by the laws of the state of Missouri, because the purchaser would thereby get a lower rate than the general public. That the sale of the same is not only void for that reason, but because it is a fraud on the purchaser and on the railroad company or a joint fraud on both. That where persons purchase such tickets innocently it frequently leads to their being ejected from trains because said scalpers represented such tickets to be good, and that where the purchaser knows they are nontransferable and void in the hands of persons other than the original purchaser, the buyer deceives the conductor and servants of the railroad, and that it is a fraud on the plaintiffs. That some of the tickets so issued have a return coupon,¹⁷⁷ which must be presented to the agent before presentation for the return trip.

"That the defendants are residents of the city of St. Louis and engaged in the business of ticket broker or scalper in the city of St. Louis, and that they have full knowledge of the character of such tickets, that they are issued at a special rate, and that they are null and void in the hands of any person other than the original purchaser. That they either deceive the buyer by representing them as good or deceive the railroad by aiding the buyer in using them, and that Herman Schubach is engaged in the business of selling such tickets and proposes to continue the sale of the same and regularly deal in the sale of said nontransferable tickets, thus defrauding the railroad or the buyers of the tickets, or both.

"That by reason of the impossibility of detecting such frauds the plaintiff is subjected to recurring loss and injury and the innocent buyer to pecuniary loss, annoyance and humiliation. That the burden cast on the conductors of detecting such fraudulent tickets subjects the railroad company to constant danger from suits for damages for unavoidable errors and subjects the railroad and public to interruption and delay in the operation of trains.

"That the railroad company has no way of discovering who the persons are who so defraud it, or who are thus defrauded, by the purchase of such nontransferable tickets, because of the impossibility of securing evidence of such frauds, and that if such frauds were detected it would lead to a multiplicity of suits. That the defendants are financially irresponsible and no judgment at law could be collected. That in consequence there is no adequate remedy at law.

"That it is the constant practice of the plaintiff and its connecting lines to issue tickets at reduced rates to the traveling public, which by their terms are nontransferable ¹⁷⁸ and constitute a special contract between the plaintiff and the original purchaser whereby the original purchaser agrees that the ticket shall not be transferred by him to any other person.

"That the defendants are and for a long time past have been engaged in the business of buying, selling and dealing in such tickets and inducing the original purchasers to sell the same."

The prayer of the petition is that the defendants therein (the ticket brokers) be enjoined from buying, selling or dealing in tickets issued by the railroad, plaintiff therein, which by the terms thereof are nontransferable.

The judges severally issued rules upon the defendants therein to show cause on a day certain why injunctions should not issue as prayed. Upon the return being made to the rule the six circuit judges before whom such injunction cases were pending sat together, and the matter was fully argued before them, with the result that they determined that temporary injunctions should issue, and accordingly each of the judges, separately, issued injunctions in the following form: "Now at this day come the parties hereto, by their respective attorneys, under the order to show cause heretofore issued herein, and submit the application for a temporary injunction to the court upon the petition and the return of the defendant to the order to show cause and the court having duly considered the same and being sufficiently advised in the premises, doth order that upon plaintiff's giving bond in the sum of two thousand five hundred dollars conditioned according to law, with good and sufficient surety or sureties to be approved by the court, or judge or clerk thereof in vacation, the defendant, his agents, servants and employes and all other persons acting for him either directly or indirectly, be, and are hereby enjoined and restrained until the further order of the court from buying, selling, dealing in or soliciting the purchase or sale of any mileage passenger

ticket, or ¹⁷⁹ any part thereof, or any excursion passenger ticket, or any part thereof, or the return coupon thereof, or any part thereof, or any commutation passenger ticket or any part thereof, now being issued, or heretofore issued and sold, or which may hereafter be issued and sold by plaintiff for passage over its railroad, or issued by any other railroad for use over plaintiff's road, or any part thereof, where any of the above described tickets were sold and where it appears upon any such ticket, coupon or return ticket that same was issued and sold below the regular schedule rate under contract with the original purchaser entered upon such ticket and signed by such original purchaser and that such ticket is nontransferable and void in the hands of any other person than the original purchaser; and from soliciting, advertising, encouraging or procuring any person other than the original purchaser of such ticket to use or attempt to use the same for passage on any train or trains of the plaintiff. Provided, however, this order shall not apply to the sale of any such aforementioned and described tickets that were purchased by defendant from plaintiff or any of plaintiff's duly authorized agents and not for defendant's use as a passenger over plaintiff's road."

Thereupon the defendants in such injunction suits applied to one of the judges of this court for writs of prohibition to prohibit the said judges from enforcing such injunctions and from entertaining further jurisdiction of such injunction suits. The petitions for prohibitions are alike, and predicate a right of action upon a charge that the circuit judges had no jurisdiction or acted in excess of their jurisdiction in the premises in the following respects:

"Plaintiff states that in and by its aforesaid proceedings said court and defendant, as judge thereof, transcended and exceeded its lawful jurisdiction in the following particulars:

"1. Said petition for injunction stated no matter or thing upon which a court, exercising equity powers, ¹⁸⁰ could grant any injunction, or the particular writ awarded in this case.

"2. Said petition for injunction is not based upon any specific property for the protection of which judicial protection is sought. But it is attempted by the injunction sought and granted in said cause to lay down a rule of civil conduct, so that the business of this plaintiff would be permanently destroyed by the exercise of the judicial power thus exercised without reference to any specific existing property.

"3. Said petition for injunction and the temporary injunction thereon granted in prescribing a rule of civil conduct regardless of any existing property, is an attempted usurpation of the legislative power of the state, which alone can prescribe a rule of civil conduct covering future transactions, having no relation to existing properties and their judicial protection.

"4. That the necessary effect of this attempted regulation of civil conduct by a blanket injunction covering property rights hereafter to be created and acquired will be the substitution of summary hearings in contempt for the orderly determination of controversies by court or jury when controversies as to existing property rights are presented for hearing.

"5. Said injunction serves the purpose of taking the property of plaintiff without 'due process of law.'

"6. Said injunction is against the law of the land and thereby, if permitted to stand, destroys a lawful avocation and business of plaintiffs.

"7. Plaintiff is remediless in this, that his business is interrupted and destroyed by the granting of the injunction herein, and that the remedy by motion to dissolve in the circuit court is wholly inadequate, as even if said injunction should be dissolved, it may be maintained in force by an appeal and in any event plaintiff's business would be wholly destroyed before the final determination of the same could be reached by this unwarranted ¹⁸¹ and illegal procedure of said court, outside of its lawful jurisdiction."

The defendants made return to the preliminary rules, setting up the proceedings in the injunction cases in the circuit court, and justifying the action of the circuit judges, and maintaining the jurisdiction of that court. The plaintiffs by way of replication ask that the preliminary rule in prohibition be made absolute, and thus the issues are made up.

For the sake of brevity the plaintiffs herein will be hereinafter referred to as the "ticket brokers," and the defendant railroads as the "railroads."

1. Reduced to its essentials and crystallized, the ticket brokers' position is, that no "concrete case" is stated in the injunction suits, which a court has power to deal with.

Or otherwise stated, that there is no existing controversy between the ticket brokers and the railroads, which could constitute a cause of action, upon which a court could act.

Or amplified, that a court of equity has jurisdiction to issue injunctions as a class, but it has no power to issue an injunc-

tion where only abstract rights are involved, or where the injury is merely apprehended or feared and is not immediate, impending and imminent, and that to authorize a court that has jurisdiction to act, "there must be an existent basis of facts affording a present right which is directly threatened by the action sought to be enjoined. It has no power to enjoin unless the conditions have already arisen and come into being, which could be injured by the acts sought to be restrained"; and that courts cannot determine the rights of parties in advance of an actual, existing controversy concerning them.

¹⁸² Or as counsel happily express it: "The abstract right must assume a concrete form before it becomes property in the judicial sense, capable of judicial protection."

These are fundamental essentials in the law, and it has always been true that there must be an actual, live subject matter, as well as actual live parties, to every suit. It is also true that courts of equity alone have power to issue injunctions, and that they never exercise this power to allay mere apprehensions of injury, but only when the injury is imminent and irreparable: *Business Men's League v. Waddill*, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501; *Lester Real Estate Co. v. St. Louis*, 169 Mo. 234, 69 S. W. 300.

The railroads and the circuit judges do not controvert these propositions. The matter, therefore, compresses itself into the question whether or not a basic subject matter, over which a court of equity has jurisdiction, was presented to the circuit court for adjudication by the injunction suits. That is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction and not of pleading, for if the court had jurisdiction over the subject matter, it had the power to decide whether the pleadings were or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in no wise impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action or the defective statement of a good cause of action, in no way affects the

The crucial question, therefore, is, Do the petitions of the railroads for injunctions against the ticket brokers present a concrete or an abstract case?

In the solution of this question the decision of the supreme court of the United States, in the case of Mosher v. St. Louis etc. R. R. Co., 127 U. S. 390, 8 Sup. Ct. Rep. 1324, 32 L. ed. 249, establishes the first postulate of the proposition. It is true, as the ticket brokers claim, that that was not an injunction suit, but the form of the action is immaterial, for it is the legal principles deduced and the rules announced that are important and pertinent.

That was a suit for damages for being put off a train. The plaintiff purchased from the defendant, at St. Louis, a ticket from St. Louis to Hot Springs and return. The ticket by its terms required that the original purchaser should identify himself to the satisfaction of the defendant's agent at Hot Springs, and that the return ticket should be officially signed and stamped by the agent at Hot Springs, all of which the original purchaser agreed to "in consideration of the reduced rate at which this ticket is sold." The plaintiff failed to so identify himself, and failed to have the return ticket so stamped, and in consequence was put off of the train, and he sued for damages. The lower court sustained a demurrer to the petition, and the supreme court of the United States affirmed the judgment, holding that a railroad company has a right to make a contract with the purchaser of a reduced rate ticket, that the original purchaser shall so identify himself, and that the return ticket shall be so signed and stamped, and that the reduced rate at which the ticket is sold affords a consideration for such a contract.

In other words, that for a valuable consideration a railroad may enter into a contract that the ticket sold to the passenger shall be nontransferable, and that the return portion shall not entitle even the original purchaser ¹⁸⁴ to a return trip, unless he so identifies himself and has the return ticket so stamped.

This is manifestly upon the principle that when persons, sui juris, enter into contracts that are not prohibited by law, based upon a valuable consideration, they must live up to them, and that each has a property right in the contract which the law will protect. In addition to this, the laws of this state

and the interstate commerce laws, while prohibiting discriminations, permit the railroads to issue excursion or commutation tickets at special rates: Rev. Stats. 1899, sec. 1127; 1 U. S. Supp. Rev. Stats., p. 690, sec. 22, and vol. 2, p. 369, c. 61.

The second postulate in the case is, that the petitions for injunctions recite that World's Fair excursion tickets, nontransferable excursion tickets, mileage tickets and commutation tickets have been issued, or will be issued, from time to time, based upon a consideration of reduced rates, which by their express terms are to be good only in the hands of the original purchaser, and that it is or will be impossible, impracticable, or at any rate unbearably inconvenient, for the original purchasers to be identified in St. Louis and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride on such return ticket is the original purchaser or not; that it would be a fraud upon the railroads for anyone except the original purchaser to ride upon such return tickets, and a fraud for the original purchaser to sell such return tickets to the ticket brokers and for the ticket brokers to sell such return tickets to any third party to be by him so used or upon the representation that they would entitle the buyer to so ride thereon; that in the nature of things the railroads could never ascertain that such frauds were about to be committed until after the trains had left St. Louis and such tickets were presented to the train conductors, and then it would be too late to ask for or receive injunctive relief against the perpetrators of such ¹⁸⁵ frauds, and that the ticket brokers are insolvent so that no adequate remedy at law could be had against them; and further that even if such frauds could be discovered in time to ask specific relief in each case, it would involve the prosecution of a multiplicity of suits to meet the exigencies.

This postulate also includes the fact that the injunctions issued by the circuit court enjoined the ticket brokers from buying, selling or dealing in any mileage tickets, and excursion tickets or the return coupon thereof, or any commutation ticket, now issued or hereafter to be issued, "where it appears upon any such ticket, coupon or return ticket that the same was issued and sold below the regular schedule rate under contract with the original purchaser entered upon such ticket and signed by such original purchaser that such ticket is nontransferable and void in the hands of any other person other than the original purchaser."

And bearing upon this proposition it is important to note in this connection that while the return of the ticket brokers to the rule to show cause why an injunction should not issue, denies the power of the court to issue an injunction, on the ground that no concrete case is presented by the petition, it then very inconsistently sets up that it has been the common practice of the railroads to issue mileage tickets, excursion tickets and commutation tickets which are stamped on their face, nontransferable, but that the practice and understanding of the ticket brokers all over the United States is, that such tickets may be transferred or sold, and that the name of the original purchaser may be signed by anyone on the return ticket, and that the ticket brokers in the litigation have a number of such tickets, which they have purchased in good faith and under the belief that they are transferable and would be honored by whomsoever presented, and that the injunction asked would render such tickets valueless and would destroy the business of the ¹⁸⁶ ticket brokers, and therefore they ask the protection of the court in that regard.

Upon the doctrine of "aider," therefore, the return of the ticket brokers helped out the insufficiency, if any, that existed in the petition, and unquestionably made a concrete case as to the tickets that are now held by the ticket brokers and presented a live subject matter, between live parties, which the court had power and jurisdiction over. Therefore, it cannot now be said that the circuit court had no jurisdiction and as that court had jurisdiction, quoad such tickets, prohibition will not lie, for a writ of prohibition can never be made to perform the functions of an appeal or writ of error, and lies only where a court, or tribunal clothed with judicial powers, acts in relation to matters over which it has no jurisdiction or having jurisdiction over the subject matter, acts in excess of its jurisdiction: *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Davison v. Hough*, 165 Mo. 561, 65 S. W. 731; *State v. Eby*, 170 Mo. 497, 71 S. W. 52.

The case might be allowed to rest here, but there are other cogent, decisive and imperative propositions which must be adjudicated to make the case complete.

It will be observed that reference is made in the petition for an injunction to the approaching World's Fair in St. Louis, and it is averred that in order to make it possible for persons of ordinary means to attend it, the railroads have been induced by the officials of the fair to agree to issue excursion tickets, at

greatly reduced rates, to all who desire to attend the fair or the various meetings, conventions, etc., that will be held in St. Louis at that time. And counsel for the railroads point out that the courts have issued injunctions against ticket brokers prohibiting them from dealing in nontransferable tickets that have been issued by the railroads on the occasions of the Nashville Centennial Exposition in 1897 (*Nashville R. R. Co. v. McConnell*, 82 Fed. 66), the meeting of the Grand Army of the Republic in Cleveland (*Railroad Co. v. Kinner*, 47 Ohio Law Bull. 294), ¹⁸⁹⁷ the meeting of the Grand Army of the Republic in Washington (*Pennsylvania R. R. Co. v. Beekman*, 31 Wash. Law Rep. 715), the meeting of the Confederate Veterans in New Orleans, in May, 1903 (*Louisville etc. R. R. Co. v. Bitterman*, 128 Fed. 176), the meeting of the National Teachers' Association in Boston, in July, 1903 (*Boston etc. R. R. Co. v. Fogg*, Super. Ct. Suffolk Co. Mass.), and the dedicatory exercises of the World's Fair at St. Louis, in May, 1903 (*Wabash R. R. Co. v. Wasserman*, decided by Hon. H. D. Wood, of the circuit court of the city of St. Louis).

Counsel for the ticket brokers meet this by saying: 1. That all those cases were decided by courts of inferior jurisdiction; 2. That in the case of *People v. Warden of Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006, 43 L. R. A. 264, the court of appeals of New York held a statute that prohibited anyone except common carriers and their agents from selling tickets for passage on railroads or vessels, to be unconstitutional; 3. That, in the case of *Delaware etc. R. R. Co. v. Frank*, 110 Fed. 689, the United States circuit court for the western district of New York denied an injunction against ticket brokers as to special tickets for the Pan-American Exposition at Buffalo, on the ground that the railroads had unlawfully combined to fix rates for such exposition; 4. That in *New York Central etc. R. R. Co. v. Reeves*, 85 N. Y. Supp. 28, 40 Misc. Rep. 490, decided October 15, 1903, and reported in *New York Law Journal* of October 24, 1903, volume 30, page 21, Judge Lambert, of the supreme court of New York, denied an injunction against the ticket brokers which sought to prohibit them from dealing in tickets that were nontransferable on their face, and held that the purchaser of such a ticket had a property interest in the ticket, which he could sell, notwithstanding that by the terms of his contract with the railroad the ticket was on its face nontransferable, and that while the railroad could lawfully refuse to transport the transferee or any

¹⁸⁸ other person than the original purchaser, on the ticket, it was not entitled to an injunction to prevent the ticket brokers from buying and selling such tickets; 5. That in all the cases cited by counsel for the railroads "a special injunction issued under the special circumstances of the special ticket for the special occasion." Or, otherwise stated, that upon special occasions the railroads can lawfully issue special tickets at reduced rates, which are nontransferable, and which the ticket brokers may be enjoined from dealing in, but that when the railroads issue special tickets, which upon their face show the contract between the purchaser and the railroad to be that they are issued at reduced rates and are not transferable, such tickets may be dealt in by the ticket brokers, and the courts cannot interfere, because they do not relate to a special occasion, such as an exposition, a meeting of the Grand Army of the Republic, or of the Confederate Veterans.

In other words, that the jurisdiction of a court of equity to issue an injunction in such cases depends upon the occasion that gave use to the issuance of such tickets, and that if the petition for an injunction recites that special tickets have been issued for a special occasion which appear on their face to have been issued at special rates and to be used by a specially named person, a concrete case is presented wherein the court can enjoin the ticket brokers from dealing in them, but if a special ticket is issued which appears on its face to have been issued at a special rate and to be used by a specially named person, but which was issued generally and not for a special occasion, only an abstract right is involved and a court of equity has no jurisdiction, and a writ of prohibition will lie against it.

Of course it must be understood that this is not the way the counsel for the ticket brokers state the matter, but it is the everyday meaning and result of their contention.

¹⁸⁹ But even if the contention of counsel for the ticket brokers that such special tickets must relate to a special occasion be true, the writ of prohibition asked herein would have to be denied as to all the railroads except the Missouri Pacific, for all except that road aver that they have issued or are about to issue such special tickets for the special occasion of the World's Fair in St. Louis, in 1904. True, they say they also intend to issue such special tickets from time to time, and the Missouri Pacific railroad does not refer to the World's Fair at all. However, to allow this case to go off upon any such consideration

or without squarely meeting and deciding it in its entirety, would not be subserving the ends of justice.

Broadly stated, therefore, the question for decision is, whether a petition by a railroad for an injunction against a ticket broker to restrain him from dealing in special tickets, which recite upon their face that they are issued at reduced rates and are nontransferable, but which do not relate to any particular occasion, states a concrete case which a court of equity has jurisdiction to hear and decide. If it does, the writ of prohibition asked for herein should be denied. If it does not, the writ should go.

The power to contract, concerning a legal subject matter, carries with it the right to make any kind of a contract in relation thereto that the contracting parties may agree upon. The power being unlimited, the nature and character and terms of the contract to be made and the occasion that gives rise and the business necessities or exigencies that prompt it, are all matters of private convention between the parties. The power to limit any kind of a contract in its operation to the contracting parties, and to exclude from its benefits any third persons, or to limit the contract as to the time it shall continue, or to leave it unlimited as to time, is recognized in law. Thus, a lease may prohibit the lessee from assigning, transferring or subletting the ¹⁹⁰ premises, either for the whole or any part of the term. A copartnership agreement necessarily excludes the right of any member to sell his interest and thereby substitute the purchaser in his place as a member of the firm, and such agreements may be limited or unlimited as to duration. A contract of hiring gives no right to either party to assign or transfer his interests or rights under the contract, and such contracts may be limited or unlimited as to duration. These illustrations are made, not because they constitute similar cases to the case at bar, but because they show that when a right to contract at all, concerning a particular subject matter, is conferred by the law, and the right so conferred is unlimited, or when the right to so contract arises out of the natural rights of man, it is purely a matter of agreement between the contracting parties what the terms, duration, character or nature of the contract shall be.

The supreme court of the United States in *Mosher v. St. Louis etc. R. R. Co.*, 127 U. S. 390, 8 Sup. Ct. Rep. 1324, 32 L. ed. 249, and the statutes of the United States and of this state, recognize the right of a railroad to issue excursion or

commutation tickets, based upon the consideration of a reduced rate. The right so conferred is not limited. There is no limitation that such tickets can be issued only upon special occasions. Neither is there any prohibition against the right to make such tickets nontransferable. Persons who do not wish to be so restricted and limited, can purchase the usual unlimited, unrestricted ticket and pay full price therefor, and then sell the unused portion thereof. But no one has any right to buy a special ticket at a reduced rate, which on its face recites that it is nontransferable and that it is supported by the consideration of a reduced rate, and thereby agree to such limitations, and thereafter violate his agreement by transferring it to another, or to complain that he has not the right to transfer it. And no third person can acquire any right or interest or power or claim in or to the ticket or to the privileges conferred thereby other than the original purchaser possessed¹⁹¹ or could confer under it, and if the original purchaser had no power to transfer it, no assignee of such purchaser could acquire any rights under it, for the original purchaser could convey none. It is wholly illogical and sophistical to say the original purchaser has a property right in the ticket—the piece of paper on which the ticket or contract is printed—which he can sell and transfer, but that the assignee acquires thereby no rights against the railroad, and it can refuse to transport him. Such reasoning confuses the piece of paper upon which a contract is written with the agreement of the parties, and erroneously separates the evidence of the contract from the contract itself. Of course any man can physically pass the piece of paper on which any kind of a contract is written to another, but that will give such other person no rights under the contract that is written on the piece of paper, if the contract itself is nontransferable.

It follows, therefore, that under the law it is competent for a railroad to issue special tickets based upon reduced rates, and to make them nontransferable, and valid only in the hands of the original purchaser, and that such tickets may be limited as to time, or as to occasion, or they may be unlimited as to time or occasion, and that the original purchaser of such tickets cannot assign or transfer such tickets or any rights whatever thereunder, to any third person.

It also follows that if any person buys such special ticket, and sells it to a third person, to be used by him or another, the railroad can invoke the aid of a court of equity to cancel the

contract because of the fraud thus perpetrated, or, if the ticket is used by another, it can sue for damages for the breach of such contract.

It also follows that if such a case at law or such a suit in equity, as to a single such ticket, presents a concrete case, over which a court has jurisdiction, a concrete case may likewise be presented if it relates to all such special tickets, whether they were all so purchased ¹⁹² and so attempted to be transferred by the same person or not. To illustrate: If a railroad should issue a thousand such special tickets, and if one ticket broker should purchase the whole issue, and thereafter undertake to throw them on the market and sell them contrary to his agreement, or should actually sell them, and if the railroad company should invoke the aid of a court of equity or of a court of law, in the one case or the other, there would be no room for doubt that a concrete case would be presented, which the court would have jurisdiction to decide.

But counsel for the ticket brokers, inferentially, say that while such conditions might present a concrete case, the petitions for injunction in these cases, and the injunctions issued by the court, cover not only such tickets as have been issued and sold, and as to which there is therefore an existing contract and hence a right of property in the contract, but that they also cover such special tickets as may hereafter be issued, from time to time, and as to which there is no contract and no property right, and which have not been sold and may never be sold, and, therefore, no concrete case is presented, and that the injunctions issued are "blanket injunctions"—as counsel call them—which undertake to prescribe a rule of civil conduct—which the legislature alone has power to prescribe—and to punish any infraction of such rule, by contempt proceeding, instead of by the usual remedies provided for a breach of such rules, and that it is therefore "government by injunction" instead of according to laws regularly enacted and enforced.

If this contention is well founded, a writ of prohibition could not be too quickly issued by this court.

But there is no proper foundation in this case for such well-known and generally accepted principles of law to apply to, and the injunction issued by the circuit court does not offend against these principles.

The injunction applies to all such special tickets ¹⁹³ as have heretofore been issued, and to such as are now being issued, and which have already been sold, and it applies also to all

such special tickets as may hereafter be issued and sold. That is, the injunction applies only to such tickets after they have been sold, and after a contract has been entered into, and after property rights under the contract have arisen, and after a controversy in relation to such property rights has arisen, and after an injury to such property rights has been threatened by the ticket brokers, and after such injury has become imminent, and under circumstances and conditions set out in the petition which show, *prima facie*, that the damage resulting to such property rights by the threatened, but as yet unperformed, acts and conduct of the ticket brokers, would be irreparable, and such as the law affords no adequate remedy for.

Such averments in a petition state a concrete case in equity, which the court has power to deal with. In fact, the original and primary office of a writ of injunction is to prevent a wrong, an injury, being done. Therefore, if the contention of counsel for the ticket brokers in this regard, that there can be no concrete case until the defendant has already acted, be well taken, it follows necessarily and logically that a preventive injunction can never issue, and the result of so holding would be to abolish preventive injunctions altogether.

It has already been made clear that the law affords no adequate remedy in cases of this kind, because of the insolvency of the ticket brokers, and because of the nature of the business and the frauds threatened upon the railroads, and upon innocent third persons who might be induced to purchase such tickets from the ticket brokers, and because of the hundreds and thousands of suits that would be necessary to redress the invasion of the rights of the railroads under such contracts, by the ¹⁹⁴ ticket brokers, and because it would not be impossible in the nature of things for the railroads to discover the frauds in time to ask preventive or injunctive relief.

"An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done": 16 Am. & Eng. Ency. of Law, 2d ed., p. 342.

And section 3649 of the Revised Statutes of 1899 provides that the remedy by writ of injunction shall exist "to prevent the doing of any legal wrong whatever, wherever in the opinion of the court an adequate remedy cannot be afforded by an action for damages."

By this, of course, is meant in any case that falls within the class of cases that are properly cognizable in a court of equity. Cases involving threatened frauds, where the defendant is insolvent and the threatened injury would be irreparable, or where the redress of the injury would result in a multiplicity of suits, fall within the class of cases properly cognizable in courts of equity: *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 666; 1 High on Injunctions, 3d ed., p. 12. The last-named author says: "The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction."

Originally injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but nonexistent injury. A concrete case is presented whenever a right of the plaintiff is threatened by the defendant, and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity. Of course, criminal cases do not fall within such a class.

Measured by these standards the petitions for injunction asked the preventive aid of a court of equity in respect to rights of the railroad which a court of equity has power to protect against invasion and injury by the ticket brokers, which injury it is alleged is imminent, impending and irreparable; and that this is so is the more clearly shown by the character of the return to the order to show cause, wherein the ticket brokers say they have invaded such rights of the railroads in the past as to such special tickets, and have money now invested in tickets of that character which will be lost if the injunction is granted, and assert an intention and right to continue to deal in such tickets.

Therefore, as to the tickets that have been issued and sold by the railroads and are now held by the ticket brokers, both parties assert a property right therein, and hence there is an existent controversy, concerning a legal subject matter, between live parties. and consequently there is a concrete case presented for adjudication to the circuit court, which it has jurisdiction to decide.

It cannot, therefore, be said that the circuit court had no jurisdiction as to those matters.

As to the tickets to be issued and sold hereafter, the railroads have a right to issue and sell tickets of such character as shall express on their face that they have been issued at a reduced rate and are nontransferable, and the ticket brokers assert a right to buy and sell and deal in them notwithstanding the terms thereof, and notwithstanding the original purchaser could confer no rights upon any one thereunder. There is, therefore, an existent property right of the railroads which the ticket brokers say they intend to invade, the danger is imminent and under the allegations of the petition the injury will be irreparable, and in the very nature of the business the injury cannot be adequately redressed ¹⁹⁶ by an action at law, or in any other manner than by a preventive injunction. A proper case for the exercise of the powers of a court of equity, by a preventive injunction, was therefore also presented for the determination of the court as to this branch of the case. And in granting such preventive injunctions the court of equity does not prescribe a rule of civil conduct, nor invade the province of the legislative branch of the government, nor does it establish a "government by injunction." It only does what has already been done by courts of equity since their adoption into the body of our institution—it enforces the rules of civil conduct prescribed by the organic law or the statute law or that arise naturally and regulate all men, by guarding the rights of one citizen against illegal invasion and irreparable injury by another citizen, and which the citizen of his own force is unable to guard for himself. And in the doing thereof, courts of equity recognize no forms, no technicalities, no delays, and no shadows, but act according to the dictates of good conscience, good morals, good conduct, and good government, and they compel every man to act right, and to respect the rights of others, whether his conscience is quick enough to appreciate the difference between right and wrong or not.

There is no merit in the contention that by granting the injunctions in question in this case, the court has infringed upon the powers of the legislative branch of the government. The court has created no right in anyone. The court has enacted no law or rule of conduct. The court has simply protected rights that are natural or were created by the legislature.

The right asserted by the railroads and denied and threatened by the ticket brokers is a right that is natural to mankind. It

is a right that the legislature of this state and the Congress of the United States have expressly conferred upon the corporation railroads, and which the supreme court of the United States has expressly declared they possess. It is a right that is guaranteed ¹⁹⁷ to every man by the organic law of the land, a right to contract concerning a legal subject matter. Such a right is property within the meaning of the law. The ticket brokers deny the existence of that right, and threaten to invade it. The law affords no adequate remedy for such an infringement of such a right. The damage will necessarily and obviously be irreparable. This being true, a concrete case for injunctive relief is presented, and in the granting of such relief it cannot justly or fairly be said that the courts invade the prerogatives of the law-making power in any manner whatever. That power has already created the identical right claimed, and it is the duty of the courts to protect that right in the same manner and to the same extent that they protect any other property rights that are possessed by any citizen. The railroads are not entitled to, and are not accorded, any right in this regard that is not as fully possessed by any citizen and that would not be protected in the same manner if such protection was invoked by the humblest citizen.

These considerations and conclusions result in holding that the circuit court had jurisdiction to hear and determine the injunction cases, and that it did not exceed its jurisdiction, and, therefore, the preliminary rule in prohibition must be discharged, at the costs of the plaintiff.

Robinson, C. J., and Brace, Burgess, and Fox, JJ., concur.

Valliant and Gantt, JJ., dissent.

Mr. Justice Valliant Dissented, and stated it as his opinion that in the present case the trial court was in error in holding that it had jurisdiction of the subject matter, and that when the trial court erroneously holds that it has jurisdiction of the subject matter in any given case and renders an interlocutory decree of injunction the effect of which is to destroy defendant's rights beyond redress by appeal in a case which cannot be heard by the appellate court in time for a reversal to be of any value to the defendant, the writ of prohibition should be issued. Judge Valliant also dissented on another proposition, and stated it as his opinion that neither the trial court nor the supreme court had jurisdiction to enjoin passenger ticket brokers from buying and selling railroad tickets to be thereafter issued, and that as to the tickets to be issued by the railroad com-

pany there was no concrete fact upon which to base a judgment, and that as the present suit is aimed chiefly at tickets to be thereafter issued, to determine in advance that the buying and selling of such tickets would be illegal and a contempt of court is to establish a rule of conduct not yet arisen, the effect of which is to destroy the business of the ticket broker, and to declare as to him any recital of fact printed on the tickets to be res judicata.

In this connection and in relation to the ticket brokerage business, it was said: "The law-making power of this state has not declared this business unlawful and the judiciary has no authority to do so, yet the effect of these injunctions is to drive these men out of business, and that is the purpose avowed in the arguments of the learned counsel for the railroad companies. It is for the legislature to declare the public policy of our law, and for the courts to apply the law to particular acts after they are committed, or acts threatening some property right when in existence. It is true these injunctions prohibited the buying and selling of only such tickets as carry on their face certain recitals, but there is nothing to prevent the railroad companies printing those recitals on the face of all tickets, and having all of them signed by a purported purchaser, and whether the recitals are true or the signature bona fide are questions on which the broker, according to the terms of these injunctions, when arraigned on a charge of contempt, will have no right to be heard. Any fact so appearing on the face of the ticket is, as to him, res adjudicata. The railroad company is clothed with the power of stating the necessary facts on the face of the ticket, and any fact when so stated becomes, by relation to the judgment, res adjudicata, and is past disputing.

"As between the plaintiffs and the defendants in those suits, if the court had jurisdiction to decree as it has decreed, the decree settles the right of the parties touching the subject adjudged, and the plaintiffs cannot, by any subsequent legislation, be deprived of their vested rights in the matters covered by that decree. If the plaintiffs are entitled to what those decrees essay to adjudge to them, then as to the defendants in those suits, no power in the land can deprive them of it. Those decrees cover tickets to be hereafter issued as well as tickets already issued and are aimed chiefly at tickets hereafter to be issued. No one will doubt but that the general assembly has the power to enact that all railroad tickets issued in this state shall be transferable or assignable, yet if the court had jurisdiction to enter the decrees that it did enter in these cases (and so far as the question of jurisdiction is concerned there is no difference between an interlocutory decree and a final decree; jurisdiction to grant a temporary injunction is jurisdiction to make it perpetual), then if the general assembly should to-morrow enact a law to the effect that all railroad tickets hereafter issued in this state should be transferable, the act would be invalid in its application to the

acts of the parties to those suits relating to tickets covered by those decrees, because if the decrees are valid they confer on those plaintiffs as against those defendants vested rights, and subsequent legislation cannot destroy vested rights. But I apprehend that if any such condition should arise it would be held that the fault was with the court which had gone beyond its jurisdiction and attempted to reach into the future to adjudicate upon cases before they had arisen. Suppose our general assembly should conclude that the business of railroad ticket brokers was detrimental to the well-being of the state and pass an act saying that anyone who should hereafter buy or sell a railroad ticket that recited on its face that it had been issued by the company at a reduced rate and for that reason was non-transferable, should be deemed guilty of a misdemeanor and upon conviction be punished by fine and imprisonment, would anyone say that the general assembly in passing that act was usurping the powers of government intrusted to the judiciary? Whatever else might be said, in questioning the validity of the act, no one would say that it was not legislative in its character, no one would claim for it that it was a judicial act. Yet that is exactly the kind of act effected by these injunctions. Our attention has been called to a bill now pending in the municipal assembly which in its essence copies the very words of these injunctions and proposes to enact them into a law. Are these railroad companies appealing to the World's Fair sentiment in the municipal assembly to induce its members to usurp judicial powers, or has the circuit court assumed legislative functions? The act in its nature is either legislative or judicial, it belongs either to the one department of the government or to the other; it cannot be exercised by both. In the language of the supreme court of Vermont, 'No power can properly be a legislative and properly be a judicial power at the same time; and as to mixed powers, the separation of the departments in the manner prescribed by the constitution precludes the possibility of their existence': *Bates v. Kimball*, 2 Chip. 87."

Mr. Justice Gantt concurred in the dissenting opinion of Mr. Justice Valliant.

The Regulation of the Sale of Passenger Tickets is discussed in the monographic note to *Jannin v. State*, 96 Am. St. Rep. 828-838. An examination of this note will disclose that many authorities hold that it is competent for the legislature to prohibit the sale of tickets by brokers, unless they are authorized by the carrier to make the sale.

STATE v. DREW.

[179 Mo. 315, 78 S. W. 594.]

STOLEN PROPERTY—Recent Possession of—Presumption of Guilt.—To raise a presumption of guilt from the possession of recently stolen property it is necessary that it be found in the exclusive possession of the prisoner. He can only be required to account for the possession of things which he actually and knowingly possessed. (p. 477.)

STOLEN PROPERTY—Recent Possession of—Presumption of Guilt.—The finding of recently stolen articles on the premises of a man of a family, without showing his actual, conscious possession thereof, discloses only a prima facie constructive possession, and is not such a possession as will justify a presumption of guilt by reason thereof. (pp. 479, 480.)

STOLEN PROPERTY as Evidence of Crime.—If in a prosecution for larceny there is no evidence of a conspiracy between the accused and another to commit the crime, articles taken from such other's house under a search-warrant are not admissible in evidence. (p. 480.)

TRIAL.—Instructions assuming that an accused has made certain statements adverse to his interest are erroneous and should be limited to the statements proved on the trial. (p. 480.)

J. C. Wallace, for the appellant.

E. C. Crow, attorney general, and S. B. Jeffries, assistant attorney general, for the state.

³¹⁶ GANTT, P. J. The defendant and one Frank Gamble were charged in an information filed by the prosecuting attorney of Chariton county with burglary and larceny of the store of Joseph Miles in the town of Dalton in said county on the 19th of May, 1901. A severance was granted and the defendant duly arraigned at the September term, 1901. At the February term, 1903, defendant was put upon his second trial for this offense, and convicted of both the burglary and larceny and sentenced to the penitentiary for a term of five years. His motions for new trial and in arrest of judgment were overruled and exceptions duly saved and an appeal granted to this court.

The evidence on which this conviction rests is substantially as follows: Mr. Miles, the prosecuting witness, had a general merchandise store in the town of Dalton, Chariton ³¹⁷ county, on Sunday, the 19th of May, 1901. When he left the store Saturday night the doors were locked and fastened, but the windows had no fastenings. On Monday morning when Mr. Miles returned to his store, he found a big light in the front

door broken and a lot of empty shoe boxes on the floor and a lot of drygoods gone. He testified he missed some shoes, worsted goods, tobacco and some meat. The shoes were branded "V. C." on the box and the shoes. The worsted dress goods were of two colors, brown and of a greenish color. Some percales, red and white striped, were also missing. The goods taken were worth between fifty dollars and one hundred dollars. A piece of percale was shown the witness and he testified he "thought" that was taken that night, but on objection this answer was excluded. Other drygoods were exhibited to the witness, but counsel for defendant objected to the identification of these unless the state first established that these were found at the house of defendant. The objection was overruled and defendant excepted and Mr. Miles answered they came out of his store and were his goods. Some shoes were also shown the witness and he said they looked like his and had the same marks and brands. He testified he got all of the foregoing goods, except the one remnant of percale, out of the house of Gamble. Thereupon defendant by his counsel moved the court to strike out all of the evidence as to the goods obtained from Gamble's house, which motion the court overruled and defendant duly excepted. He testified he got these goods under a search-warrant from the houses of Gamble and defendant some two or three weeks after the burglary was committed. He further testified that defendant said he, Miles, would have to show where defendant got the goods found at his house; that they had got it from Mrs. Cook, who also had a store in the town. On cross-examination Mr. Miles admitted he had testified on a former trial of this case that his store was burglarized on Saturday night instead of Sunday night as he now ³¹⁸ stated. That he could not identify the one piece of percale found in defendant's house by any mark, but only by its general appearance. He would not positively say this was a piece of his goods. That he could not state that the goods in his store were exactly like this piece. It was simply a piece of red and white percale he had in his store at that time. When he went to defendant Drew's house he also found a little piece of white goods there. He did not take that at the time, neither did he take this piece of percale. He did not take the percale because defendant said he got it from Mrs. Cook and he thought he would see her before taking it. Defendant said he got the white goods also from Mrs. Cook. This piece of white goods and this piece of percale was all he

found in defendant's house. He did not claim the white goods, which the evidence of Mrs. Cook and defendant's wife conclusively established came from Mrs. Cook's store. Mrs. Cook testified she sold defendant's wife the white goods on Saturday before the burglary, but did not sell defendant or his wife the percale; that she never had a piece like it in her store.

Mr. Veatch, the sheriff, testified he served the search-warrant and got the piece of percale at defendant's house. The trunk was locked and defendant's daughter brought her mother the key to the trunk and he found this piece of percale in that trunk. Defendant was not present at the time. Witness says that there was a piece of white goods and the percale in his hands when defendant and his wife said they got the goods from Mrs. Cook. Does not think they said either piece particularly. After Mrs. Cook said they did not get the percale from her an officer went back to defendant's house and got it. Until then Mr. Miles was uncertain that it was his.

On the part of defendant the evidence tended to prove that Mrs. Gamble used Mrs. Drew's sewing-machine and, as a recognition of their kindness, gave the piece of percale to Julia Drew, the fifteen year old ³¹⁹ daughter of defendant, and that it with the white goods purchased from Mrs. Cook was in an unlocked bureau drawer at defendant's house when the officer found and afterward took it. Mrs. Gamble gave this piece to Miss Drew on Saturday before the defendant was arrested about the middle of June, 1901. There was also evidence that Mrs. Gamble's father bought the goods in Kansas City and gave it to his daughter. Various errors are assigned for reversal of the judgment.

Among other instructions, the court gave the following: "2. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that on or about the nineteenth day of May, A. D. 1901, at the county of Chariton in the state of Missouri, some one did feloniously and burglariously break into and enter the storehouse and building of Joseph Miles and steal therefrom goods and chattels mentioned in the information or any of said goods and chattels, and that soon thereafter said goods and chattels or any part thereof were found in the exclusive possession of Hamp Drew, then and in that event the law presumes that the defendant is guilty of both burglary and the larceny, and unless the defendant has accounted for the possession of said goods, to your reasonable satisfaction, or rebutted the presumption arising from the re-

cent possession of said goods, as defined in these instructions, you should find him guilty as charged in the information; but the court instructs you that the defendant may rebut the presumption of guilt arising from recent possession of stolen property or explain his possession by either direct evidence or attending circumstances or the character or habits of himself by some other mode equally satisfactory as to the innocence of the accused."

1. This instruction is challenged because counsel for defendant insists that the testimony does not show an actual possession by defendant of any of the stolen ³²⁰ goods, but a mere constructive possession by reason of the fact that one piece of percale which the prosecuting witness thought was his because it resembled that which he had in his store was found in a trunk in the house of defendant, which his daughter testified was given to her only a day prior to the burglary by Mrs. Gamble.

This court, in *State v. Castor*, 93 Mo. 242, 5 S. W. 906, adopted Greenleaf's statement of the law on this point (3 Greenleaf on Evidence, sections 32 and 33), wherein he says: "But to raise the presumption of guilt from the possession of the fruits of the crime by the prisoner, it is necessary that they be found in his exclusive possession. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the party responsible to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed; as, for example, where they are found upon his person, or in his private apartment, or in a place of which he keeps the key."

In *Castor's* case the evidence showed the stolen goods were found in his trunk, but it was shown that his employer had access to the trunk; that he had lent the key to another to get some blacking and a brush and the key remained in the hands of the borrower for four days. And it also appeared that the trunk was often left unlocked in the house of the owner of the stolen goods and the trunk could be unlocked by a cupboard key and could have been unlocked by another familiar with the locus in quo. In these circumstances it was ruled that defendant's possession was not exclusive. That decision has been approved by this court: *State v. Baker*, 144 Mo. 329, 46 S. W. 194.

In *State v. Belcher*, 136 Mo. 137, 37 S. W. 800, it was said: "The recent possession of stolen property raises a presumption of guilt, but what constitutes recent possession which will justify this instruction is a preliminary question for the court. It is the settled law of this court ³²¹ that to raise this presumption the stolen goods must be found in the exclusive possession of the prisoner": *State v. Castor*, 93 Mo. 242, 5 S. W. 906; *State v. Warford*, 106 Mo. 55, 27 Am. St. Rep. 322, 16 S. W. 886; *State v. Scott*, 109 Mo. 226, 19 S. W. 89; *State v. Owsley*, 111 Mo. 450, 20 S. W. 194.

In *Belcher's* case, as in this, the larger part of the goods were found in the possession of another, one Edwards, and the remainder found in the home of the defendant's mother, and there was no evidence to indicate that defendant had any other possession than that shared by the family in common save and except as to a pair of overalls and a pair of shoes, and it was a question whether these were a part of the stolen goods, and it was not held to be exclusive or recent enough to justify this instruction.

In *State v. Warford*, 106 Mo. 63, 27 Am. St. Rep. 322, 16 S. W. 886, it was said by Judge MacFarlane: "It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property, when such possession could also, with equal right, be attributed to another."

In this case there was no evidence that defendant knew of the possession by his daughter or wife of this piece of dress goods. The fact that it was in the house of which he was the head was at most merely a constructive possession, especially when the character of the goods, an article of female attire of whose existence the father might well be and generally is ignorant until made up, is taken into consideration. The father was not at home when the search was made and the piece of goods was found in the trunk or the drawer of a bureau. There was also independent evidence that this piece of goods was in defendant's house prior to the burglary. It is evident that the state's case rested upon the fact that this one piece of percale was found in defendant's house some three weeks after the burglary of Miles' store. Although there was a large ³²² amount of dress goods, tobacco, meat, shoes, etc., stolen and defendant's premises were carefully searched by the officer under the search-warrant, no part of the stolen goods were found there except this piece of percale, if it be conceded that

it was a part of the stolen goods, and no other evidence connecting him with the crime. While it is true Mr. Miles testifies that defendant said they got the percale from Mrs. Cook, the officer who was present and who testified for the state says he had both the white goods and the percale in his hands when defendant said they got the goods from Mrs. Cook and did not particularize which piece. It was shown that as to the white goods this statement was true.

One proposition, then, is presented: Was the possession of the wife or daughter in the circumstances detailed such an exclusive possession in defendant as justified this instruction? Was it anything more than that constructive possession which every head of a family is presumed to have of property in his house or on his premises?

In *Regina v. Pratt*, 4 Fost. & F. 315, Chief Baron Pollock, whose learning and immense experience give great weight to his judgments, laid it down that the mere fact of the goods being on the prisoner's premises, which might be without his knowledge or assent, does not prove possession, much less receiving by him, for another might have put the goods on the premises without his knowledge, and he directed the jury to acquit.

So in *State v. Owsley*, 111 Mo. 450, 20 S. W. 194, in which two stolen revolvers were found in the possession of Mrs. Owsley, the wife of the defendant, but he was not at that time living with her, it was ruled that the possession of the wife could not be regarded as the exclusive possession of the husband. While the possession of the wife was the possession of the husband at common law for the purposes of civil liability, that law also recognized and held the wife as a criminal agent for crimes ³²³ committed by herself not in the presence of her husband, and even in his presence, when she alone was the active and inciting party to the offense: *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222.

In our opinion, the mere fact of finding stolen articles on the premises of a man of a family without showing his actual conscious possession thereof discloses only a prima facie constructive possession and is not such a possession as will justify a presumption of guilt by reason thereof. It is within the common experience that many honest and worthy men have dishonest children and servants, and to indulge the presumption that because goods are found on their premises which turn out to have been stolen, without going further and showing

an actual conscious and exclusive possession of such goods in the head of the family, would result oftentimes in punishing the innocent for the guilty.

There is no occasion for pushing the presumption to any such length. Kept within its proper limitations it is a salutary principle and reasonable, but given a latitudinous constructive interpretation it is unreasonable, and would work grave injustice: *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55; *Cowen and Hill's Notes to Phillips on Evidence*, 530; *Wharton's Criminal Evidence*, sec. 758, and cases cited; *Turbeville v. State*, 42 Ind. 495; *Roscoe's Criminal Evidence*, 18; *Field v. State*, 24 Tex. App. 422, 6 S. W. 200; *Burrill on Circumstantial Evidence*, 450; *Lehman v. State*, 18 Tex. App. 174, 51 Am. Rep. 298.

In our opinion there was no such actual, conscious, exclusive possession of this piece of percale by the defendant as would justify the giving of instruction No. 2 on behalf of the state.

2. As there was a total failure to show any confederacy or conspiracy between the defendant and Gamble, the court erred in admitting in evidence the goods taken under the search-warrant from Gamble's house. It could not fail to have a prejudicial effect on defendant. In the absence of evidence tending to prove a conspiracy, ³²⁴ this evidence threw no light on the guilt or innocence of defendant, but was irrelevant and incompetent. As the case may be retried it may be remarked that if the jury should find that Mrs. Gamble gave defendant's daughter the piece of percale three weeks after the burglary, and that prior to such gift defendant had no possession of the percale, such a second-hand possession by the daughter would not create a presumption of guilt: *State v. Warford*, 106 Mo. 55, 27 Am. St. Rep. 322, 16 S. W. 886; *State v. Scott*, 109 Mo. 226, 19 S. W. 89. Having explained his possession, it devolved upon the state to show his explanation was false or improbable.

3. The fifth instruction is open to the criticism of defendant that it assumes that defendant had made statements adverse to his interest and that it should have been limited to conversations proved on the trial. These defects can be readily remedied, however, if it shall be deemed advisable to further prosecute the case.

For the errors noted, the judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

All concur.

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Introductory.

The possession of stolen property as evidencing the guilt of the possessor of the crime committed when the property was stolen, is necessarily, from the very nature of such crimes, especially of larceny and burglary, a kind of evidence which is very essential in fixing the guilt of the person committing the crime. Hence the decisions in which the subject has been passed upon are quite numerous. They, however, are very discordant, and in many instances are incapable of being reconciled. Much of the confusion in regard to the law on this subject has arisen from the loose expressions used by the

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courts in describing the probative effect arising from the fact of the possession of the stolen property. The earlier authorities were discussed in the monographic note to *Hunt v. Commonwealth*. 70 Am. Dec. 447.

I. Application of the Doctrine.

a. **To Larceny.**—The rules formulated by the courts as to the probative force of evidence showing possession of stolen property by the accused naturally apply to cases in which the crime of larceny is charged: *State v. Armstrong*, 170 Mo. 406, 70 S. W. 874; *State v. Brady*, 121 Iowa, 561, 97 N. W. 62.

b. **To Burglary.**—The doctrine is also applied to burglary cases: *State v. Warford*, 106 Mo. 55, 27 Am. St. Rep. 322, 16 S. W. 886. The weight of authority, however, seems to be that it is necessary to show by some other evidence that there was such a breaking and entry of the building whence the property was stolen as would fulfill the requirements regarding that element of the crime of burglary, and that the goods found in the possession of the accused were stolen from the house on that particular occasion: *King v. State*, 99 Ga. 686, 59 Am. St. Rep. 251, 26 S. E. 480; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; *State v. Williams*, 120 Iowa, 36, 94 N. W. 255; *Strickland v. State* (Tex. Cr.), 78 S. W. 689. See, also, *Fuller v. State*, 48 Ala. 273; *People v. Bielfus*, 59 Mich. 576, 26 N. W. 771; *Metz v. State*, 46 Neb. 547, 65 N. W. 190. The rule and its application were shown in *Lester v. State*, 106 Ga. 371, 32 S. E. 335, wherein it was said: "To maintain a conviction for the offense of burglary, it is absolutely essential that proof of the breaking and entering be made. It is not at all necessary for the character of evidence which establishes the corpus delicti to be positive and direct; but it is necessary that the corpus delicti be shown by evidence which is legal, admissible, and which establishes the fact beyond a reasonable doubt. If one be found in the recent possession of goods shown to have been stolen from the house at the time of the breaking and entering, such possession is sufficient to connect the person in possession with the perpetration of the offense. But it is not of itself conclusive: *Jones v. State*, 105 Ga. 649, 31 S. E. 574. In this case there were no external or internal evidences that the house was broken. The theory of the state was that it was entered by the unlocking of the door by some person unauthorized, but there was no proof, direct or circumstantial, that such was the case, other than the fact that the property was stolen from the house and apparently no other entry could have been made than by means of unlocking the door. The loss of the property seems to have been relied on as a proof of the entry, and the possession of the defendant to be taken as a fact sufficient to authorize his conviction of the breaking and entering. This is not sufficient. As it is necessary, when the recent possession of goods stolen from the house at the time of a burglarious entry is relied on to connect the defendant with such entry, the breaking and entering

must be clearly shown before the circumstances of possession can in any way connect the defendant with the offense charged."

In *Roberson v. State*, 40 Fla. 509, 24 South. 474, the court said: "But unless the goods were obtained by a breaking and entry—in other words, unless the breaking and entry and the larceny were parts of the same transaction, or if not parts of the same transaction, unless the breaking and entry and the larceny were committed by the same person—the exclusive possession of property recently stolen does not warrant a presumption that the possessor is guilty of the breaking and entry, although it does warrant a presumption that he is guilty of larceny": Citing *Knickerbocker v. People*, 43 N. Y. 117; *Commonwealth v. McGorty*, 114 Mass. 299; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; *State v. Rivers*, 68 Iowa, 611, 27 N. W. 781; *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *People v. Wood*, 99 Mich. 620, 58 N. W. 638.

The rule just stated was also approved in *People v. Hannon*, 85 Cal. 374, 24 Pac. 706; *State v. Brady*, 121 Iowa, 567, 97 N. W. 62; *State v. Powell*, 61 Kan. 81, 58 Pac. 968; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836.

As we will see later on in this note, there is no great discord among the authorities as to the mere admissibility of evidence of possession of stolen goods as a mere circumstance, but there is a difference of opinion among the courts as to the effect or weight of such evidence. In *State v. Brady*, 121 Iowa, 565, 97 N. W. 62, it was said: "As to the effect to be given in prosecutions for burglary to proof of possession of goods stolen in connection with the breaking and entering, the authorities are not entirely in harmony. There are decisions holding without qualification that the fact of possession of property recently stolen under such circumstances has no tendency to prove the possessor's guilt of burglary: *People v. Gordon*, 40 Mich. 716. On the other hand, cases may be found to the effect that such fact alone creates a sufficient presumption of guilt to justify a conviction: *Knickerbocker v. People*, 43 N. Y. 177. Our own cases have gone to neither extreme, and are, we think, in harmony with the weight of authority. As laid down in *State v. Rivers*, 68 Iowa, 616, 27 N. W. 781, the rule approved by this court is that: 'The possession of property which has been stolen from a building which had been broken and entered is not alone prima facie evidence that the one having it is guilty of the burglary. Such possession unexplained does raise a presumption that the party is guilty of larceny, but it does not follow that both crimes were committed by the same party. The one who committed the larceny may have found the building open after the burglary was committed, and may have entered and stolen the goods without having been concerned in the breaking. It is obvious, therefore, that the mere possession of the stolen goods does not have the same tendency to connect him with the burglary which it does with the larceny.' "

In *People v. Boxer*, 137 Cal. 562, 70 Pac. 671, it was held that the recent unexplained possession of stolen property, the fruits of a burglary, may be considered as a circumstance tending to show guilt when considered with other suspicious circumstances, but not when the stolen property came into their possession after the commission of the burglary by other parties. In *Mangham v. State*, 87 Ga. 549, 13 S. E. 558, it was held that the recent possession of stolen property from a burglarized house, not satisfactorily explained, may be sufficient to establish the guilt of the defendant where the fact of the burglary is established and the jury believe from all the evidence that the defendant is guilty. And in *State v. Hullen*, 133 N. C. 656, 45 S. E. 513, it was held that recent possession of stolen goods was a circumstance tending to show that the possessor broke and entered the house from which the stolen goods were burglarized.

c. **To Robbery.**—Evidence showing the possession of goods recently stolen under circumstances making the larceny constitute the crime of robbery was admitted in *Moses v. State*, 88 Ala. 78, 16 Am. St. Rep. 21, 7 South. 101; *State v. Wyatt*, 124 Mo. 537, 27 S. W. 1096; *State v. Balch*, 136 Mo. 103, 37 S. W. 808. Although the cases in which the doctrine relating to the possession of stolen goods with reference to the crime of robbery are not very numerous, still the practice of receiving such testimony is quite general. From the very nature of the crime of robbery, such possession ought not to be of controlling weight unless the essential elements of the crime of robbery are proved and there are other circumstances connecting the possessor of the stolen goods with the crime. It seems that the same principles which a court would apply to evidence of such possession in a burglary case ought to apply in a robbery case.

d. **To Receiving Stolen Property.**—Evidence of possession of stolen goods is naturally admissible in prosecutions for receiving stolen property. In *State v. Guild*, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909, it was held that the recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances, and, unexplained, is sufficient to warrant a conviction for receiving stolen property. The same holding was made in *Goldstein v. People*, 82 N. Y. 231; *People v. Weldon*, 111 N. Y. 569, 19 S. E. 279. In *Cooper v. State*, 29 Tex. App. 8, 25 Am. St. Rep. 712, 13 S. W. 1011, it was held that such possession was a mere circumstance to be considered by the jury in connection with other evidence in the case. In a subsequent case in Texas, that of *Castleberry v. State*, 35 Tex. Cr. Rep. 382, 60 Am. St. Rep. 53, 33 S. W. 875, it was held that the mere fact, standing alone, that an accused person received stolen property was not sufficient proof to establish that he knew that the property was stolen when he received it. In *Regina v. Matthews*, 1 Den. C. C. 610, the court went to the extent of saying, in a prosecution for receiving stolen goods: "He bought the

goods of a thief, and they are found in his house. *Prima facie*, if stolen goods are found in a man's house, he, not being the thief, is a receiver." The question was also discussed in *Regina v. Langmead*, 1 Leigh & C. 427.

II. Effect of Possession of Stolen Property.

a. **In General.**—It is on the question what effect the possession of stolen property has upon the guilt or innocence of the possessor that the courts differ in their statements of what the law is in that respect. Many of the courts, perhaps, use loose expressions in their statements of the probative force of such evidence. In our discussion of this branch of the subject we shall arrange the cases according to the general expressions which seemed to indicate the probative force which it was contended that the evidence afforded. It seems to us that the correct rule was announced by Justice Bonfield, in *State v. Mandich*, 24 Nev. 340, 54 Pac. 516, wherein he said: "In prosecutions for larceny the fact that the stolen property is, recently after the theft, found in the possession of the defendant, can always be given in evidence against him. The strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case, and is for the jury to determine." In *State v. Gillespie*, 62 Kan. 469, 84 Am. St. Rep. 411, 63 Pac. 742, after a general discussion of the subject, the court remarked: "Nor do we think that, as a matter of law, the mere possession of goods recently stolen on the occasion of a burglary may be sufficient, even in connection with other criminating circumstances, to raise a presumption of guilt of the burglary. The difference in strength and cogency between evidence tending to show guilt and evidence sufficient to raise a presumption of guilt is not great enough, if it exists at all, to justify the drawing of distinctions between the rules applicable to the two states of moral conviction they generate. As just remarked, evidence tending to show guilt may tend so strongly to show it as to raise a presumption of guilt, and a presumption of guilt, if not rebutted, is sufficient to convict of crime. It is the unexplained possession of recently stolen goods that tends to show guilt or raises a presumption of guilt of the larceny, and it is the unexplained possession of goods recently stolen on the occasion of a burglary that tends to show guilt or raises a presumption of guilt of the burglary."

b. **As a Presumption of Guilt.**—The courts which state the rule to be that unexplained possession of recently stolen goods creates a presumption that the possessor is guilty of the larceny or of the burglary, if the larceny of the goods is shown to have taken place at the time when the house was burglarized, do not always show whether a presumption of law or fact is meant, but leave it to be inferred from the language used by the court. In *Johnson v. State*, 148 Ind. 524, 47 N. E. 926, it was said: "When it is proved that property

has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails to so satisfactorily account for such possession, or gives a false account, the presumption arises that he is the thief." In *Atzroth v. State*, 10 Fla. 210, it was said: "It is a well-settled principle that if a man be found in possession of stolen property, the law presumes him to be the thief, in the absence of satisfactory explanation." And in *Territory v. Casio*, 1 Ariz. 485, 2 Pac. 755, the court, after adverting to *People v. Chambers*, 18 Cal. 383, and *People v. Brown*, 48 Cal. 253, wherein it was said that recent possession was a mere circumstance, admitted that the same rule ought not to apply to small articles which readily pass from hand to hand as to property which cannot be so easily disposed of. It then remarked that: "It has been generally understood that the prisoner's exclusive and unexplained possession of stolen property recently after the theft raises the presumption that he is the thief, and that this presumption takes the burden of proof from the prosecution and lays it upon the prisoner": Citing *Roscoe's Criminal Evidence*, 18; 2 *Russell on Crimes*, 337; *Knickerbocker v. People*, 43 N. Y. 177; *People v. Walker*, 38 Mich. 156; *State v. Brady*, 27 Iowa, 126; *State v. Creson*, 38 Mo. 372; *State v. Turner*, 65 N. C. 592; *Waters v. People*, 104 Ill. 544. So, also, in *State v. Graves*, 72 N. C. 482, it was said: "'When goods are stolen, one found in possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief.' This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liberty to act on, notwithstanding the statute which forbids a judge from intimating an opinion as to the weight of the evidence. But this rule, like that of *falsum in uno, falsum in omnibus*, and the presumption of fraud, as a matter of law from certain fiduciary relations (see *Lea v. Pearce*, 68 N. C. 90), has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidence to support the conclusion; in other words, the fact of guilt must be self-evident from the bare fact of being found in possession of the stolen goods, in order to justify the judge in laying it down as a presumption made by the law; otherwise it is a case depending on circumstantial evidence to be passed on by the jury." In *State v. Garvin*, 48 S. C. 258, 26 S. E. 570, the court, though terming the presumption a legal one, held it to be a matter for the jury. In its discussion of the matter the court said: "Very clearly the law does impose the duty upon a man, under such circumstances, to explain how he came into possession of such stolen goods. If a man is innocent, it is very easy for him

to tell how he became possessed of stolen property. If he declines to do so, or is caught lying when he does explain, the law places a very heavy responsibility upon him. Chief Justice O'Neill in the case of *State v. Kinman*, 7 Rich. 497, quoted this rule, as laid down in 2 East's Pleas of the Crown, section 93, at page 656: 'It may be laid down generally that whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously.' Also it was held in *State v. Bennett*, 3 Brev. 514: 'This is a motion for a new trial, on the ground of misdirection in the judge in stating to the jury that the lapse of time between the loss of the articles stolen and the finding of them, being about two months, was not sufficient to rebut the presumption of guilt arising from their being found in defendant's possession. A legal presumption of guilt always arises from the possession of stolen goods.' Of course all this must be submitted to the jury. The circuit judge in the case at bar did no more than call to the attention of the jury this presumption; he did not attempt to dictate their verdict. Let this exception be overruled." It was substantially held in *State v. Jordan*, 69 Iowa, 506, 29 N. W. 430, that the unexplained possession of recently stolen property raises only a circumstance tending to show guilt, though the court cited approvingly *State v. Kelly*, 57 Iowa, 647, 11 N. W. 635, where it was held that the presumption arising from such a possession may be overcome. In the very recent case of *State v. Carr* (Del.), 57 Atl. 370, the court said: "Where recent stolen property is found in the possession of a person, the rule of law is that such person is presumed to be the one who stole it, unless he accounts satisfactorily to the jury for his possession. Whenever a reasonable explanation or account of the possession is satisfactorily proven by the prisoner, it is incumbent upon the state to show that such an account is false."

Some of the courts, however, say in general terms that such possession raises no presumption of guilt. Thus in *Bryant v. State*, 116 Ala. 445, 23 South. 40, the court said: "The unexplained possession of property does not raise the presumption that the property was stolen. There must be other evidence of the *corpus delicti*; and when this has been shown, the actual unexplained possession of the recently stolen goods is a fact from which the jury may infer the guilt of defendant. The declarations of a defendant, when found in possession of the stolen property, explanatory of his possession are for the consideration of the jury, together with all the other evidence in determining the question of his guilt or innocence."

In *Griffin v. State*, 86 Ga. 261, 12 S. E. 409, the court, in discussing the correctness of a charge, said: "We are not very well satisfied with this charge. If it was the meaning of the court to state to the jury that when the crime of larceny had been proved and the goods

stolen were found shortly thereafter in the possession of the prisoner, the law would then authorize the jury to presume the prisoner guilty, such charge would not be error. But we think this court laid down the correct doctrine, as applicable to cases of this sort, in the case of *Falvey v. State*, 85 Ga. 157, 11 S. E. 607, wherein it was held that, where stolen goods are found in the possession of a defendant charged with burglary, shortly after the commission of the offense, such fact would authorize the jury to infer that the accused was guilty, unless he explained the possession to their satisfaction. In the case of *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120, this question was discussed by Bleckley, J., to some extent, and it was there said: "There is a wide difference between resting the result of a trial upon facts which legally constitute the offense charged, and making it turn upon other facts which are merely evidence of the constituent facts." Where the facts proved constitute the offense charged in the indictment, then it would be proper for the court to instruct the jury that if they believed such facts they should convict the defendant: See *Parker v. State*, 34 Ga. 262; *Tucker v. State*, 57 Ga. 503. The presumption in such a case is not one of law but of fact: 1 *Wharton's Criminal Law*, sec. 729; 3 *Greenleaf on Evidence*, sec. 31; *Hall v. State*, 8 Ind. 439; *State v. Hodge*, 50 N. H. 510; *Stover v. People*, 56 N. Y. 315; *Graves v. State*, 12 Wis. 591; *Crilley v. State*, 20 Wis. 231. We think the case of *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120, fully sustains the view we have stated, and is the law of this state upon the subject." In *Harper v. State*, 71 Miss. 202, 13 South. 882, it was held that the law raises no presumption from recent possession of stolen goods, but that it was a circumstance for the jury. In *State v. Hodge*, 50 N. H. 510, the court in holding that there is no legal presumption of guilt from the exclusive possession of recently stolen property, after reviewing the origin of the doctrine very exhaustively, said: "Whether the defendant in this case had any possession of the watch and chain at any time, either when they were found or before; whether his possession, if any he had, was recent enough, or exclusive enough, or unexplained enough, to raise a presumption of guilt—were questions of fact for the jury. There was some evidence to be submitted to the jury on those questions. If the jury found the defendant had the property in his possession after it was stolen, that fact was evidence against him. If they found an absence of explanatory evidence on his side, under circumstances which tended to show he could furnish such evidence, that fact was additional evidence against him: *Rex v. Burdett*, 4 Barn. & Ald. 161, 162; 1 *Phillips on Evidence*, 4th Am. ed., 598; *J. F. Stephen's Criminal Law*, 303. But if those facts were found, there was no presumption of law, nor was the burden of proof shifted. The state, in the indictment, made an affirmation of the defendant's guilt, which the defendant traversed in his plea. The state had the affirmative, and the burden of proof which belongs to the affirmative.

The question, from the beginning to the end of the trial, was whether the affirmative allegation of guilt was proved by the testimony introduced on both sides, and by the evidence which consists of the nonproduction of testimony, not including the refusal of the defendant to testify if there was such a refusal." The court in *Methard v. State*, 19 Ohio St. 363, stated its view of the law in the following clear language: "The facts that a building was burglariously entered, goods stolen therefrom, and the possession by the accused, soon thereafter, of the goods stolen, are competent evidence to go to the jury, and in connection with other circumstances indicative of guilt, such as giving a false account or refusing to give any account, of the manner in which, or the means by which, he came into possession of the stolen goods, they may afford a strong presumption of fact of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and the larceny. But we are not prepared to say that the facts of burglary, of larceny, and of possession of the stolen goods soon thereafter by the accused, alone raise a presumption of law that he is guilty of both the burglary and larceny. 'Nothing can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances; nothing more inconclusive supposing it to stand alone.' And 'whatever the nature of the evidence the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract'": Citing *Best on Presumptions*, sec. 230. In *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785, the court held that mere possession of stolen goods shortly after the larceny does not raise any legal presumption of guilt of the possessor, but is merely a circumstance to be considered by the jury in connection with the other facts in the case. In *Williams v. State*, 60 Neb. 526, 83 N. W. 681, the discussion arose over the propriety of an instruction of the trial court upon the subject. The court in referring to the instruction said: "By it the jury are, in effect, instructed that the possession of stolen property immediately after the theft is sufficient to warrant a conviction, unless the presumption of guilt thus arising is overcome by the attending circumstances or other evidence, in so far as to create a reasonable doubt of the person's guilt, when an acquittal should follow. Under the doctrine as announced and adhered to in this state 'no presumption of guilt arises from the mere fact of possession of stolen property, but that the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evidence adduced on the trial.'" And continuing the court said: "The presumption of innocence attends the accused through every step of the trial, until the jury finds his guilt established under the evidence beyond a reasonable doubt. The tendency of the instruction is to shift the burden and require the accused to overcome the presumption stated in the instruction by attending cir-

cumstances or other evidence sufficient to raise in the minds of the jury a reasonable doubt of his guilt. The burden of proof in a criminal action does not shift to the accused." In *Bellamy v. State*, 35 Fla. 245, 17 South. 560, it was said: "It is well settled that the possession of goods recently stolen does not raise a presumption, as matter of law, of the guilt of the possessor, but that the presumption arising from such possession is purely a matter of fact to be passed upon by the jury, and of which they are the sole judges under our system of laws; but it is, nevertheless, true that the presumption of guilt as a question of fact is permitted by the law to be drawn by the jury from the unexplained possession of the recently stolen goods."

In *Gablick v. People*, 40 Mich. 292, a codefendant who had pleaded guilty to the larceny testified that he had placed the stolen articles in the other defendant's bed, and that the other defendant was not concerned in the larceny. Justice Cooley, in delivering the opinion of the court, said: "This being the evidence, the court was requested to instruct the jury that 'the fact of possession of stolen property standing alone and unconnected with any other circumstance, affords but slight presumption of guilt, for the real criminal may have artfully placed the property in the possession or on the premises of an innocent person the better to conceal his own guilt.' This request the court refused, but the jury were instructed that they must consider all the circumstances and allow the evidence such weight as they believed it deserved.

"We think the plaintiff in error was entitled to the instruction requested. It is perfectly true that the jury must judge of the proper weight of the evidence, but when evidence is laid before them which only indirectly tends to raise an inference of guilt, and the importance of which must depend altogether upon circumstances, it is the right of the respondent to have the jury instructed how the circumstances bear upon the presumption of guilt. Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see *People v. Walker*, 38 Mich. 156); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered. A jury may or may not attach importance to these circumstances; but as the law permits the inference of guilt to be drawn under some circumstances, and not under others, the jury should have some instructions how to deal with these circumstances when they are placed before them."

c. *As Conclusive Evidence of Guilt.*—In *State v. Moore*, 101 Mo. 316, 14 S. W. 182, it was held that the possession of recently stolen property raises a presumption that the possessor stole it, and that this presumption becomes conclusive unless it is overcome or refuted by the circumstance of the taking or possession or by proof reason-

ably satisfactory that such possession was innocently or honestly acquired, where no evidence is introduced as to the defendant's good character.

The rule, however, which is supported by the weight of authority is that unexplained possession of recently stolen property is not conclusive evidence of defendant's guilt. Thus, it was said in *State v. Denel*, 63 Kan. 817, 66 Pac. 1037, that: "Neither the possession nor unexplained possession of the fruits of a recent larceny is, as a matter of law, conclusive evidence of the guilt of the possessor. They are facts which may be introduced in evidence, and it has been held by this court that if the possession is immediate after the commission of the crime and unexplained, it is *prima facie* evidence of guilt, but nowhere have we been able to find an authority for saying, as matter of law, that it is conclusive. The unexplained possession of a subject of a recent larceny is *prima facie* evidence of the guilt of the accused, and is sufficient to authorize the jury in finding a verdict of guilty; but, as in all other circumstances, the jury is the exclusive judge of its conclusiveness." So, also, in *Stokes v. State*, 58 Miss. 677, the court, in speaking of the effect of such possession, said: "Where unexplained by the party, it becomes much more potent and will of itself justify and support a verdict of guilty. Under no circumstances, however, does it ever attain to the dignity of a conclusive presumption of law which compels such verdict, but always remains a presumption or inference of fact from which guilt may, by the jury, be deduced. It is frequently spoken of, both by courts and text-writers, as a legal presumption, or *presumptio juris*; and, though the expression is inaccurate, it would not be deemed material or necessitate a reversal where, notwithstanding the error of nomenclature, the jury were still left free to exercise their own judgment as to whether it demonstrates guilt to their satisfaction; but where they are told that it is a conclusive presumption of law, upon which they must or should find the accused guilty, it is fatally erroneous. They may be told that it is a circumstance strongly indicative of guilt, and that it will justify, support or warrant a verdict for the state; but they must still be left to decide whether, in fact, it does satisfy them of guilt beyond a reasonable doubt.

"Under no circumstances does the law make possession of stolen property conclusive proof of guilt and deduce as a *presumptio juris et de jure* that the party in possession is the thief. This is a deduction which must be made by the jury or not as it satisfies their consciences; and however strongly the one fact may seem to follow from the other, they cannot be told that they must infer it, or that the law infers it for them"; citing *Graves v. State*, 12 Wis. 591; *Hull v. State*, 8 Ind. 440; *Perry v. State*, 41 Tex. 483.

As supporting the same views, see, also, *Boykin v. State*, 34 Ark. 443; *People v. Ah Ki*, 20 Cal. 178; *Blaker v. State*, 130 Ind. 203, 29

N. E. 1077; *Gablick v. People*, 40 Mich. 292; *Curtis v. State*, 6 Cold. 9; *Wilecox v. State*, 3 Heisk. 110.

d. **As Prima Facie Evidence of Guilt.**—Some of the courts in speaking of the character of evidence of unexplained possession of recently stolen property characterize it as prima facie evidence of the larceny or of the burglary under some circumstances: *State v. Raymond*, 46 Conn. 345; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *State v. Frahm*, 73 Iowa, 355, 35 N. W. 451; *State v. Conway*, 56 Kan. 682, 44 Pac. 627; *State v. Daly*, 37 La. Ann. 576; *State v. Merrick*, 19 Me. 398; *State v. Yandle*, 166 Mo. 589, 66 S. W. 532; *Price v. Commonwealth*, 21 Gratt. 846. In *State v. Powell*, 61 Kan. 81, 58 Pac. 968, it was said that mere possession without other facts indicative of guilt is not prima facie evidence of burglary. And in *State v. Herron*, 64 Kan. 363, 67 Pac. 861, it was said that while unexplained possession of stolen property is not conclusive of guilt, it is prima facie evidence of larceny, and may be submitted as a question of fact from which guilt may be inferred. And in *Stockman v. State*, 24 Tex. App. 387, 5 Am. St. Rep. 894, 6 S. W. 298, it was said that unexplained possession of recently stolen property is prima facie evidence of theft, but the presumption is not a legal one, but is one of fact to be found by the jury. It has also been held that while unexplained possession of recently stolen property is prima facie evidence of larceny, it is not prima facie evidence of the burglary at which the larceny was committed: *State v. Shaffer*, 59 Iowa, 290, 13 N. W. 306; *State v. Brundige*, 118 Iowa, 92, 91 N. W. 920; *Porterfield v. Commonwealth*, 91 Va. 801, 22 S. E. 352. The use of the words "prima facie" in charging the jury in such cases was criticised in *Dobson v. State*, 46 Neb. 250, 64 N. W. 956. In that case the discussion arose over the propriety of an instruction, the court saying: "On its own motion the court gave the following instruction, to which plaintiff in error duly excepted: '4. The jury are instructed by the court possession of the stolen property, recently after the same had been stolen, unexplained by the circumstances attendant thereon or otherwise, constitutes prima facie evidence of the guilt of the party so found in the possession thereof.' In *Robb v. State*, 35 Neb. 285, 53 N. W. 134, it was said: 'The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial: *Thompson v. People*, 4 Neb. 529; *Thompson v. State*, 6 Neb. 102; *Greutzinger v. State*, 31 Neb. 460, 48 N. W. 148; 2 *Thompson on Trials*, sec. 1894.' It is perhaps true that in the case just cited there was not a direct disapproval of the use of the words 'prima facie' in the connection in which they occur in the above copied instruction, and yet, impliedly, there was such disapproval in the language quoted. If the effect to be given the fact of possession was solely for the jury, it was improper for the court

to instruct that such evidence should be deemed *prima facie* sufficient for any purpose. Whether it was *prima facie* or conclusive was solely for the jury to determine, unaided by any suggestions of the court upon that proposition of fact."

e. **As Sufficient to Warrant, Justify or Sustain Conviction.**—Some of the courts when speaking of the weight of evidence of such possession of stolen property say that it will warrant a conviction. Thus it was held in *State v. Guild*, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909, that recent possession of stolen property is evidence that the person stole it or received it knowing it to be stolen, and when unexplained is sufficient to warrant conviction. In *Huggins v. People*, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002, it was held that unexplained possession of stolen property almost immediately after the larceny raises a presumption of fact which will warrant conviction of the burglary and the larceny. In *Gravitt v. State*, 114 Ga. 841, 88 Am. St. Rep. 63, 40 S. E. 1003, the court, in speaking of the subject, said: "It is true, as has been repeatedly ruled by this court, that such possession, unexplained, or not satisfactorily explained, is a very strong circumstance, upon which the jury will be authorized to infer the guilt of the accused. But to charge that this circumstance creates a presumption of law that the one so found in possession of stolen property is guilty of the theft thereof, and is of itself proof of guilt, is to compel the jury to do that which they are merely permitted by law to do. The presumption is one of fact and not of law. There is nothing in what is here laid down which conflicts with the case of *Jones v. State*, 105 Ga. 650, 31 S. E. 574; for while it is there stated as a general rule that the recent, absolute and unexplained possession of stolen goods raises a presumption of the guilt of the person having such possession, the greatest length to which the rule is carried is that it is sufficient to warrant the conviction of the accused, and at another point in the opinion the following language is used: 'It is true that the possession of goods stolen at the time of the commission of a burglary is but a circumstance. If it is recent, it is, when unexplained, a very strong circumstance tending to show the guilt of the possessor, and it is sufficient to put the burden of explaining the possession on the person charged with the offense.'"

The rule as applicable to burglary cases was stated in *State v. Powell*, 61 Kan. 81, 58 Pac. 968, as follows: "In *State v. Shaffer*, 59 Iowa, 290, 13 N. W. 306, it was said: 'The presumption of guilt which arises, in a case of larceny, from the possession of goods recently stolen, does not apply with equal force to the crime of burglary with intent to steal. Such possession is evidence tending to show that the defendant committed the burglary, but is not of itself sufficient, even if unexplained, to warrant conviction': See, also, *Davis v. People*, 1 Park. Cr. Rep. 447; *Brooks v. State*, 96 Ga. 353, 23 S.

E. 413; *Talaferro v. Commonwealth*, 77 Va. 411; *State v. Grave*, 72 N. C. 482; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Jackson v. State*, 28 Tex. App. 143, 12 S. W. 701; *Stuart v. People* 42 Mich. 255, 3 N. W. 863; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; 1 *Wharton's Criminal Law*, sec. 813; *Will's Circumstantial Evidence*, 97; 5 *Am. & Eng. Ency. of Law*, 2d ed., 61, and cases there cited.

"The possession of stolen goods taken on the occasion of a burglary is evidence tending to establish the guilt of the possessor, and may, when taken in connection with other criminating circumstances, raise a presumption of guilt sufficient to warrant a conviction, but the mere possession, without any other facts indicative of guilt, is not *prima facie* evidence that such person committed a burglary, and therefore the instruction was prejudicial error." See, also, *Langford v. People*, 134 Ill. 444, 25 N. E. 1009, to the same effect.

Sometimes the courts say that such a possession will justify a conviction: *People v. Boxer*, 137 Cal. 562, 70 Pac. 671; *State v. Raymond*, 46 Conn. 347; *People v. Wood*, 99 Mich. 620, 58 N. W. 638. In connection with the statement that such a possession will justify a conviction, the court in *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785, illustrated the province of the court in such cases, in the following language: "It is evident that mere possession of stolen goods by a party accused ought not to be in every case, if in any, sufficient evidence to justify a conviction. Take the case of a reputable citizen, whose character is such that no suspicion of crime has attached to him, charged with stealing a horse, and the only proof is that the horse was found, the next morning after he was stolen, in his stable, the stable being one which could be entered without the aid of the accused. Clearly in such a case the presumption of innocence would outweigh the inference of guilt arising out of the fact of possession. So, if a purse of money had been stolen in a crowd, and soon after the theft the same had been found in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon. It is not so much the mere possession of the stolen goods, as it is the nature of the possession; whether it is an open or unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger, than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value. It would be impossible to enumerate the variety of circumstances attending the mere possession of stolen goods, which would lessen or increase the inference of guilty possession. In directing a jury, therefore, as to the weight they should give to the possession of stolen goods or the instruments

of crime as evidences of guilt, care should be taken not to place too much importance upon the mere possession, but their attention should be called to the character of the possession and the circumstances attending it. Without holding that the learned circuit judge erred in his instructions to the jury upon this point, under the whole evidence in the case, we are inclined to think too much stress was laid upon the fact of the possession, and perhaps not enough upon the circumstances under which the accused was found in the possession."

In *Jackson v. State*, 28 Tex. App. 370, 19 Am. St. Rep. 839, 13 S. W. 451, it was held that the possession of stolen goods without other evidence of guilt is not *prima facie* evidence of burglary, but that where burglarized goods are immediately or soon after found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct will sustain the inference, not only that he stole the goods, but that he also made use of the means by which access to them was obtained.

Other courts have also held that the single circumstance of possession of recently stolen property is not sufficient to sustain a conviction of either larceny or burglary: *People v. Fagan*, 66 Cal. 534, 6 Pac. 394; *People v. Cline*, 83 Cal. 374, 23 Pac. 391; *Davis v. State* (Tex. Cr.), 74 S. W. 919; *State v. Duncan*, 7 Wash. 336, 38 Am. St. Rep. 888, 35 Pac. 117.

f. As an Inference of Guilt.—The terms "presumption" and "inference," when used with reference to the effect of evidence of the possession of stolen property as evidencing the guilt of the possessor, seem to be used interchangeably, and it is more than likely that they are used by the courts as synonymous in all those cases where the presumption which is said to arise from such possession is deemed one of fact.

In *Ayres v. State*, 21 Tex. App. 399, in commenting upon the effect of such possession, the court said: "Whilst it is true, as a legal proposition that unexplained possession of property recently stolen is *prima facie* evidence of theft, and whilst the law would from such circumstances authorize an inference and presumption of guilt, such an inference and presumption is not a mere legal one, but is one of fact to be found by the jury, and the court should, in no instance, charge the conclusiveness of such presumption or inference, but should submit them as facts to be found by the jury, for, at most, they are but circumstances only from which guilt is inferred and not positive proof establishing it." In *Orr v. State*, 107 Ala. 39, 18 South. 142, the court said: "The unexplained possession of property does not raise the presumption that the property was stolen. There must be other evidence of the *corpus delicti*. When this has been shown and the stolen property, soon after the offense, is found in the possession

of a person who is unable to give a satisfactory explanation of his possession, then the jury are authorized to infer his guilt. We are aware in some courts it is held that the unexplained possession of property recently stolen as a matter of law raises a presumption of guilt from the circumstances, but our opinion is, the best considered cases, and it is the safest rule, to leave it with the jury to say whether the unexplained possession of goods recently stolen satisfies them beyond a reasonable doubt of the guilt of the defendant." So, also, in *Gravitt v. State*, 114 Ga. 841, 88 Am. St. Rep. 63, 40 S. E. 1003, it was held that recent possession of stolen property by one accused of burglary, not satisfactorily explained, is a circumstance for which the jury is authorized to infer his guilt, but that such possession does not create a presumption of law against him and that it is not of itself conclusive. And in *Harper v. State*, 71 Miss. 202, 13 South. 882, it was said: "The law raises no presumption from recent possession of stolen goods; such possession is a circumstance for the jury's consideration in determining the question of the defendant's guilt, and in the absence of a reasonable explanation the jury may infer guilt." So, also, in *Johnson v. Territory*, 5 Okla. 695, 50 Pac. 90, which was a well-considered case, the court in discussing the effect of such possession in a burglary prosecution, said: "In such a case testimony which tends to prove the commission of the larceny also tends to prove the commission of the burglary; but the evidence of unexplained possession of recently stolen property would have no more force and weight in such a case than in a case of larceny. In either it is but a circumstance tending to show the guilt of the defendant, if established as a fact by the evidence beyond a reasonable doubt. The inference, also of fact, may flow therefrom, that the recent and unexplained possession is because the possessor stole the property. The only inference, however, to be drawn from such proof is an inference of fact, and however strong the circumstance may be, or however irresistible the inference that may follow, no presumption, as a matter of law, flows from such proof. The law presents against the defendant in a larceny or burglary case no presumption excepting that which it exercises in all cases—that is, that every man is presumed to intend the natural consequences of every deliberate act—and that presumption is never carried to the extent of asserting his guilt as a matter of law, no matter how strong the evidence may be. The law of this territory is that 'a defendant in a criminal action is presumed to be innocent until the contrary is proven.' This does not mean that he is presumed to be innocent until one fact is proven against him in the case; that is, that he had exclusive possession of recently stolen property. It requires more than one fact, however potent it may be, to overthrow this presumption of the defendant's innocence. It requires the verdict of a jury, and until that verdict is returned, and accepted by the court, the defendant is, throughout

the case, presumed innocent, and on the return of a verdict by the jury he is for the first time presumed guilty." And continuing, the court said: "The court is the judge of the law, but from being the judge of the law it cannot lay down to the jury presumptions of law from facts proven, which, being exercised, would make the court, rather than the jury, the ultimate arbiter of the cause. A presumption is a conclusion drawn from the proof of facts or circumstances, and stands as establishing facts until overcome by contrary proof; and if the court could say that such a conclusion of guilt should be drawn from one of the important facts of the case, then the presumption of innocence which obtains in favor of the defendant throughout the trial would be transformed into a presumption of guilt as soon as the one fact was proven. This is not the law." And in concluding the court said: "Any presumption that may be drawn from such possession is a presumption of fact merely; in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law"; Citing Wharton's Criminal Evidence, 58; *Smith v. State*, 58 Ind. 340; *State v. Hodge*, 50 N. H. 510; 3 Greenleaf on Evidence, sec. 31; *Ingalls v. State*, 48 Wis. 656, 4 N. W. 785; Bishop's Criminal Procedure, sec. 745, and *Methard v. State*, 19 Ohio St. 363. See, also, *State v. Bliss*, 27 Wash. 463, 68 Pac. 87, to the same effect. That unexplained possession of recently stolen property is a fact from which the possessor's guilt may be inferred was also held in *Bryant v. State*, 116 Ala. 445, 23 South. 40; *State v. Sanford*, 8 Idaho, 187, 67 Pac. 492; *Madden v. State*, 148 Ind. 183, 47 N. E. 220; *Palmer v. State* (Neb.), 97 N. W. 235; *State v. Rosencrans*, 9 N. Dak. 163, 82 N. W. 422; *State v. Sally*, 41 Or. 366, 70 Pac. 396, *Considine v. United States*, 112 Fed. 342.

g. As a Mere Circumstance Tending to Show Guilt.—It may be stated as a rule supported by authority that the possession of goods recently stolen may always be shown as a circumstance in connection with other evidence which tends to show the possessor's participation in the crime: *Leonard v. State*, 115 Ala. 80, 22 South. 564; *Dodd v. State*, 33 Ark. 517; *People v. Getty*, 49 Cal. 581; *People v. Lowrey*, 70 Cal. 193, 11 Pac. 605; *People v. Cline*, 83 Cal. 375, 23 Pac. 391; *People v. Jockinsky*, 106 Cal. 638, 36 Pac. 1077; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Roberson v. State*, 40 Fla. 509, 24 South. 474; *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154; *Murks v. State*, 92 Ga. 449, 17 S. E. 266; *Boswell v. State*, 92 Ga. 581, 17 S. E. 805; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *State v. Collett* (Idaho), 75 Pac. 271; *Dawson v. State*, 65 Ind. 442; *State v. Tucker*, 76 Iowa, 232, 40 N. W. 725; *Johnson v. Commonwealth*, 12 Ky. Law Rep. 873, 15 S. W. 671; *People v. Carroll*, 54 Mich. 334, 20 N. W. 66; *People v. Wood*, 99 Mich. 620, 58 N. W. 638; *State v. Bryant*, 134 Mo. 246, 35 S. W. 597; *State v. Jones*, 19 Nev. 365, 11 Pac. 817; *State v. Lax* (N. J. Sup.), 59 Atl. 18; *Knickerbocker v. People*, 43 N. Y. 117; *Am. St. Rep.* Vol. 101—32

Langford v. State, 17 Tex. App. 445; Boyd v. State, 24 Tex. App. 570, 5 Am. St. Rep. 908, 6 S. W. 853; Taylor v. State, 27 Tex. App. 463, 11 S. W. 462; Lamater v. State, 38 Tex. Cr. 249, 42 S. W. 304; Cooper v. State, 29 Tex. App. 8, 25 Am. St. Rep. 712, 13 S. W. 1011; Favro v. State, 39 Tex. Cr. 452, 73 Am. St. Rep. 950, 46 S. W. 932; Boersh v. State (Tex. Cr.), 62 S. W. 1060; Jones v. State (Tex. Cr.), 68 S. W. 267; People v. Kerm, 8 Utah, 268, 30 Pac. 988; State v. Harrison, 66 Vt. 523, 44 Am. St. Rep. 864, 29 Atl. 807; Walker v. Commonwealth, 28 Gratt. 969; Wright v. Commonwealth, 82 Va. 183; Branch v. Commonwealth, 100 Va. 837, 41 S. E. 862; Murphy v. State, 86 Wis. 626, 57 N. W. 361.

Hence the courts sometimes say that such unexplained possession is a guilty circumstance: People v. Brady, 133 Cal. xx, 65 Pac. 823; State v. Sanford, 8 Idaho, 187, 67 Pac. 492; Johnson v. Territory, 5 Okla. 695, 50 Pac. 90; State v. Sally, 41 Or. 366, 70 Pac. 396; State v. Bliss, 27 Wash. 463, 68 Pac. 87. Of course the weight to be attached to such possession as a criminating circumstance is, by the weight of authority, a matter for the jury and depends upon all the circumstances of the case. It seems that no rule can be formulated which would fit all cases, without invading the province of the jury. The recent case of People v. Lang, 142 Cal. 482, 76 Pac. 232, illustrates the weight which logically will force itself upon the minds of the jury from a possession accompanied by suspicious circumstances or false explanations. In that case the owner missed his overcoat from his room on the evening of August 6th, although he had placed it in the clothes-press on the morning of the 5th. The court in reviewing the case, said: "There is evidence, which, if true (and we must presume it to be for the purposes of this case), shows that on the morning of August 6th the defendant took the overcoat to a loan office at 22 Mason street and pawned it for four dollars; that he signed a fictitious name on the books at the loan office, to wit: 'G. Reed, 1101 Eddy St.'; that the overcoat is the property of Orr; that it was found at the loan office by detectives Dinan and Wren; that the name 'G. Reed, 1101 Eddy St.,' written in the books of the loan office is the handwriting of defendant, and that defendant when arrested denied that he pawned the overcoat. We think the above facts sufficient to justify the implied finding of the jury that the defendant entered the room where the overcoat was, and from which it was taken. Some one took it from the rooms of Orr on or about the time charged. Defendant on the same day had the coat in his possession. He took it to a loan office. He there signed a fictitious name and afterward denied the signature. While possession of the stolen property is not of itself sufficient evidence of the guilt of the party in whose possession it is found, still the recent possession, unexplained, is a very strong circumstance, when taken in connection with other circumstances that point to guilt. The fictitious name given at the loan office, the pawning of the coat on the very

day it was lost, and the denying of the signature on the books of the loan office are potent facts which are sufficient to justify the inference of guilt. The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained: *Davis v. People*, 1 Park. C. C. 447; *Knickerbocker v. People*, 57 Barb. 365; *Regina v. Exall*, 4 Fost. & F. 923; *Walker v. Commonwealth*, 28 Gratt. 969; *Methard v. State*, 19 Ohio St. 363; *Wharton's Criminal Law*, sec. 763 et seq.; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Smith*, 86 Cal. 238, 24 Pac. 988. In the latter case this court said in speaking of a conviction of burglary: 'The evidence of the recent possession of the stolen property, together with the defendant's statements and the circumstances surrounding the transaction, were sufficient to warrant the jury in their verdict.' The overcoat could not well have been taken from Orr's rooms without the party who took it having entered the room."

In *People v. Abbott*, 101 Cal. 645, 36 Pac. 129, the court held that unexplained possession of stolen property was a circumstance tending to show guilt and that the possessor must explain his possession in order to remove its effect as a circumstance of that character.

III. Nature and Conclusiveness of Presumption.

a. *Nature of the Presumption Raised.*—In commenting upon the various characterizations made by the courts of evidence of possession of recently stolen property in the last subdivision, we necessarily discussed the subject of this subdivision to a certain extent, hence we will not add much to what has been already said on the subject. In the somewhat early but well-considered case of *State v. Hodge*, 50 N. H. 510, the court in discussing the nature of the presumption which is said to arise from such possession, reviewed many of the early English cases and discussed the general origin of the rules regarding the effect of such possession. At page 521 of the opinion the court said: "Under various influences adverse to a critical and rigid maintenance of the distinction between law and fact, not only was it the practice for the judge to give the jury his opinion on the facts, but it was recognized by all the authorities as a correct practice. When, for many ages, the court had constantly said to the jury: 'There is such and such a presumption' without making any reference to, or thinking of, its character as a presumption of law or a presumption of fact, how could its true character be understood and preserved? It would have been wonderful if such a uniform and approved practice had not, in the course of time, practically buried or obliterated the dividing line between law and

fact. At very many points, and particularly through the regions of presumptions, and produced great difficulties for those who should endeavor to make partition of what had so long been held in common and undivided, thoroughly commingled and blended together. We are not left to conjecture whether such a practice would be likely to produce such a result. We know it has produced it. We are now contending with those difficulties. The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (including the presumption from possession of stolen property), that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence. To clear the law of this encumbrance, revive elementary principles, strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon us by the constitution as interpreted in *Pierce v. State*, 13 N. H. 536." Then after commenting on the decision of the last cited case, which held, on constitutional grounds that the jury are not the judges of the law in criminal cases, the court continued: "This point is so well settled and so well understood that no one would suppose it in the power of the legislature to transfer the duty of finding the facts, from the jury to the judge, in any case in which a party has a constitutional right to a trial by jury and insists upon his right. And if the judge cannot constitutionally take that duty upon himself when expressly directed so to do by a statute, he cannot constitutionally take it upon himself in the absence of such a statute. When, therefore, we have come to the conclusion that the presumption from possession of stolen goods is a presumption of fact we find ourselves prohibited by the constitution from delivering to the jury the presumption as a result binding upon them, or a rule by which they are to be governed." In the very recent case of *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, the nature of the presumption arising from such possession was also discussed. The discussion arose over an instruction. The court said: "The further instruction in the same paragraph that the effect of such possession of stolen property is 'to raise a presumption of guilt of the defendant unless the attending circumstance or other evidence overcome the presumption that is hereby raised as to create a reasonable doubt of guilt,' has perhaps too much support in some of the precedents to justify us in reversing the case on that ground; but we think the language unhappily chosen. The law does not attach a 'presumption of guilt' to any given circumstance, nor does it require the accused to 'overcome the presumption thereby raised' in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reason-

able doubt of the defendant's participation in the crime. It is in this sense that the words 'presumption' and 'prima facie evidence' must be understood when employed in this connection: *Smith v. State*, 58 Ind. 340; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Commonwealth v. Randall*, 119 Mass. 107; *Smith v. People*, 103 Ill. 82; *Bronson v. Commonwealth*, 92 Ky. 330, 17 S. W. 1019; *People v. Fitherington*, 59 Cal. 598. In 1 McClain's *Criminal Law*, section 617, it is said the rule here stated is 'sounder in principle than that which requires the defendant in some form to overcome the presumption and establish his innocence.' That the word 'presumption' as used in this class of cases, indicates no more than that the fact of possession is sufficient evidence to sustain a finding of guilt, is shown by the language, employed in the opinion of this court in *State v. Kelly*, 57 Iowa, 646, 11 N. W. 635, where it is said: 'The recent unexplained possession of stolen property tends to establish the guilt of the person in whose possession it is found, and will authorize conviction unless the inference of guilt is overcome by other facts tending to establish the innocence of the accused. . . . The law holds that the presumption in question, unless overcome, will authorize a conviction.' If, as here indicated, the term 'presumption of guilt,' be understood as something which authorizes conviction, and not something requiring it, its use is not open to just criticism; but, unless guarded by proper explanation, we think there is danger that jurors may give it the latter construction." And in *Blaker v. State*, 130 Ind. 205, 29 N. E. 1077, it was said: "The presumption thus raised is a presumption, or rather an inference of fact, and not a legal presumption: *Smith v. State*, 58 Ind. 340. That is, the courts cannot say, because of such possession and want of explanation, that as a question of law the accused must be deemed guilty, but the jury are authorized to consider such evidence as tending to show guilt, and, the larceny being shown, the circumstances connected with such possession, and want of explanation may be sufficient to make the question of guilt as a question of fact, conclusive and sufficient in and of themselves to justify conviction.

"The length of time that must elapse after the larceny of goods before their possession should cease to be considered as tending with other facts to show guilt is, as a rule, purely a question of fact for the jury. Naturally, the shorter the time the stronger the inference, but the weight of such inference must be determined by the jury."

It has been held in quite a number of cases that the presumption raised by possession of stolen property is a presumption of fact and not of law: *Boykin v. State*, 34 Ark. 443; *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905; *Bellamy v. State*, 35 Fla. 242, 17 South. 560; *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Campbell v. State*, 150 Ind. 74, 49 N. E. 905; *Snowden v. State*, 62 Miss. 100; *State v. Hale*, 12 Or. 352, 7 Pac. 523; *State v. Pomeroy*, 30 Or. 16, 46 Pac.

797; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Heaton*, 23 W. Va. 773.

b. Effects on Burden of Proof.—We have seen from the cases already considered that an explanation of the possession of recently stolen property is necessary in order to overcome the effect of the evidence of the possession no matter whether the possession be considered as raising a presumption, inference or a mere circumstance of guilt: See *People v. Abbott*, 101 Cal. 645, 36 Pac. 129, to that effect. So, also, in the recent case of *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, it was stated that: "The law does not attach a 'presumption of guilt' to any given circumstance, nor does it require the accused to 'overcome the presumption thereby raised' in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime." In *Van Straaten v. People*, 26 Colo. 188, 56 Pac. 905, the court after holding that the presumption of guilt arising from such possession, is one of fact for the jury, said: "It being, therefore, a mere inference of fact, the court erred in instructing the jury that the recent possession of the stolen property was in law a strong criminating circumstance, thereby giving the jury to understand that the guilt of the accused is a presumption which the law requires shall be made from the fact of his being found in possession of the stolen property, instead of an inference or conclusion of their own, which they may or may not adduce from that fact, in connection with the other facts and circumstances of the case. It is also erroneous in imposing upon plaintiffs in error the burden of satisfying the jury that they came into possession of the property honestly. The law imposes no such burden upon a defendant in a criminal case. If the possession of the property by plaintiffs in error had been of such a character as, unexplained, would have constituted a criminating circumstance, it would not have devolved upon them to show, even by a preponderance of testimony, that they came by it honestly. If their explanation created a reasonable doubt in the minds of the jury as to that fact, it would be sufficient to rebut the presumption of guilt." So, also, in the case of *Johnson v. Territory*, 5 Okla. 695, 50 Pac. 90, quoted from extensively in the section relating to inferences of guilt, it was substantially held that the burden of proof never shifted to the defendant in a criminal case. Many of the cases, as we have seen, in stating the rule, broadly say that the law imposes the burden upon the possessor of recently stolen property to account for his possession and show that his possession was innocently acquired. See *Johnson v. State*, 148 Ind. 524, 47 N. E. 926, as an example of those cases. The preceding sections treating on the effect of the posses-

sion of stolen property contain many illustrations of such statements of the rule. In *Cooper v. State*, 87 Ala. 135, 6 South. 303, the rule was stated in the following language: "The settled rule in this state is, that the possession of goods, recently after a larceny or burglary, which were stolen in the commission of the offense, imposes on the possessor the onus of explaining his possession, if he would repel the inference of complicity in the crime." So, also, in *State v. Manley*, 74 Iowa, 561, 38 N. W. 415, the court in reviewing an instruction said: "Under it the jury were warranted in convicting the defendant on proof of the fact that he had the stolen property in his possession, unless he had established to their satisfaction that he did not steal it. But that is not the rule. The defendant was entitled to an acquittal, unless the jury could say, upon a consideration of all the evidence, that they entertained no reasonable doubt of his guilt. But a reasonable doubt may be engendered by evidence which does not satisfactorily establish the fact sought to be proven. If the evidence was sufficient to raise a reasonable doubt as to whether defendant received the property under the circumstances claimed by him, it necessarily raises such doubt as to his guilt, in so far as that question rests alone upon the fact of possession." And this same court in the very recent case of *State v. Raphael*, 123 Iowa, 454, 99 N. W. 151, said: "The appellant, Joseph Raphael, insists that, because of his explanation of his possession of the silverware found in the attic and taken therefrom upon the first search, the case as to him should not have gone to the jury, and that the court erred in not directing a verdict for him. But with this contention we cannot agree. This property was found in his possession but a few days after it was stolen, and in the absence of a satisfactory explanation of the possession, the jury would be justified in finding that he broke and entered the building from which it was stolen: *State v. Jennings*, 79 Iowa, 513, 34 N. W. 799; *State v. Williams*, 120 Iowa, 36, 94 N. W. 255; *State v. Brady*, 121 Iowa, 561, 97 N. W. 62. It is true that the convenient other person from whom stolen property is so often received was present in this case in the defendant's explanation, but the jury would not be bound to believe the explanation, though it might not be contradicted by other direct evidence; and if the attendant circumstances were such as to satisfy it of the falsity of the explanation, and of the guilt of the defendant, a conviction would be justified." In *State v. Weston*, 9 Conn. 527, 25 Am. Dec. 46, it was held that possession of stolen property throws upon the possessor the burden of accounting for his possession. And in *State v. Garvin*, 48 S. C. 258, 26 S. E. 570, it was said the possessor must rebut the presumption of guilt raised by possession of recently stolen property and in *State v. Briscoe*, 3 Penn. 7, 50 Atl. 271, it was said that the possessor of recently stolen property must overcome the presumption that he is the thief. In *People v. Hart*, 10

Utah, 204, 37 Pac. 330, it was held, under a statute providing that defendant's refusal to testify can in no manner prejudice him, that the fact that defendant makes no statement explaining his possession of a pistol six hours after a burglary raises no presumption against him. And in *State v. Eubank*, 33 Wash. 293, 74 Pac. 378, it was held under a Washington statute that possession of a range animal throws the burden of explaining possession on him, though it was said the rule was otherwise in ordinary larceny cases.

It may be observed in this connection that although many of the courts in stating the rule regarding the raising of a presumption from the fact of recent possession of stolen property fail to state that the possession in order to raise the presumption must have been unexplained, still a close reading of these cases will generally disclose the fact that the possession about which they were speaking was an unexplained one. Indeed, many of the cases distinctly state that it is the very want of an explanation which gives rise to the probative effect of such a possession. It seems to us that viewing the matter in that light, evidence of the possession of recently stolen property places the accused possessor in no worse position than proof of any other unexplained fact tending to show a defendant guilty of an offense. The nature and effect of explanations given by the possessor concerning the acquisition of his possession will be discussed in a subsequent part of this note.

c. Effect of Good Reputation on Presumption.—The admissibility of evidence of the good reputation of the possessor of recently stolen property to rebut the effect of the evidence of his possession as a criminating circumstance does not seem to be disputed: *State v. Sarseen*, 75 Mo. App. 197; *Watts v. People*, 204 Ill. 233, 68 N. E. 563. The effect of such evidence seems to be a matter for the jury. In *State v. Carr* (Del.), 57 Atl. 370, it was said: "Evidence of good character, when offered, is to be considered by the jury in connection with all the testimony in the case, in their endeavor to reach their conclusion as to the guilt or innocence of the accused." So, also, in *State v. Hogard*, 12 Minn. 293 (Gil. 196), it was held that such proof is proper but that its weight is for the jury. In *State v. Merrick*, 19 Me. 398, in speaking of such evidence as a mode of overcoming the effect of the fact of being in possession of recently stolen property, the court said: "Proof of good character may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the recent possession of stolen goods. As, for instance, where the party really guilty, to avoid detection, thrusts, unobserved in a crowd, the article stolen into the pocket of another man. This may be done and the innocent party be unconscious of it at the time. And yet good character is not proof of innocence although it may be sufficient to raise a reasonable doubt of guilt."

And in *State v. King*, 122 Iowa, 4, 96 N. W. 712, the court in speaking of the effect of such evidence in such cases, said: "But ap-

pellant insists that, as the evidence was purely circumstantial, the proof of good character ought to be held so far defensive as to overcome any inference of guilt to be drawn therefrom. Such evidence, however, has been frequently declared to afford no defense. It is received as merely tending to show that the accused would not have been likely to have committed the crime charged, and is to be given such weight only as the jury may deem it entitled to receive": Citing *State v. House*, 108 Iowa, 68, 78 N. W. 859; *State v. Northrop*, 48 Iowa, 583, 30 Am. Rep. 408. See, also, *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55; *People v. Curran* (Cal.), 31 Pac. 1116; *Watts v. People*, 204 Ill. 233, 68 N. E. 563.

IV. What Constitutes Possession.

a. *In General.*—In *State v. Smith*, 2 Ired. (24 N. C.) 402, the court, in discussing the nature of the possession of stolen property necessary to constitute a presumption of guilt, said: "But when we examine the cases, in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies only when this possession is of a kind which manifests that the stolen goods have come to the possessor by his own act, or, at all events, with his undoubted concurrence." So, also, in *People v. Curran* (Cal.), 31 Pac. 1116, it was held that the fact that stolen wheat was stored in an outhouse of defendant by a codefendant, whom it was not shown that he knew, was insufficient to show such a possession as would warrant a conviction. So in *State v. Van Winkle*, 80 Iowa, 16, 45 N. W. 388, which was a cattle theft case, the court said: "There was testimony tending to show that defendant made his home at his father's. He was a single man, and so far as appears, had no other home. He always came there to stay when not at work elsewhere, and when there worked on the farm. In his testimony he speaks of the place as 'our house.' The presumption of guilt that arises from recent unexplained possession of the stolen property does not attach until the possession is shown. Whether the accused had possession was a question for the jury. This testimony was not only competent as tending to show that the defendant had possession of the cattle, but also as bearing on the question whether the cattle had strayed or were stolen.

"The part of the instruction complained of is as follows: 'If the animals in question were found on the farm of defendant's father a short time after they were stolen, if they were, and even if that was defendant's home, still this would not necessarily put said animals in possession of defendant unless you find that he exercised control over the same under a claim in himself.' This instruction was certainly as favorable to defendant as he could ask." And in *State v. Kreiger*, 4 Mo. App. 584, it was held that testimony showing that the stolen goods were found concealed underneath clothing, in

the false bottom of a bureau drawer, which defendant acknowledged to be his, and of which he kept the key, if unexplained, is sufficient proof that the goods were found in defendant's possession to support a conviction on that point. In *Watts v. People*, 204 Ill. 233, 68 N. E. 563, it was held that where hogs were driven in defendant's yard by his son and a third person without defendant's knowledge, that there was no such possession as would make the defendant prima facie guilty of larceny of the hogs. And in *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905, it was said: "The only circumstance disclosed by the testimony that could tend in any way to criminate the plaintiffs in error was the alleged possession by them of the stolen property. While in the absence of direct proof of the taking, the possession of stolen property is a circumstance from which the jury may infer that the accused committed the theft, yet in order to give to this circumstance an evidentiary force sufficient to sustain a conviction, the possession must be personal and exclusive, recent and unexplained, and must involve a distinct and conscious assertion of property by the defendant": Citing Wharton on Criminal Evidence, sec. 758, and cases cited.

b. Necessity for Identification of the Stolen Property.—That the alleged stolen property must be identified as being the property of the alleged owner does not seem to be disputed. What evidence constitutes an identification is of course a matter for the jury. The necessity for a clear identification is illustrated by the following cases: Thus, in *State v. Ballard*, 104 Mo. 634, 16 S. W. 525, it was held that the larceny of a cow described as a "red and white spotted, line back cow" was not sustained by evidence showing possession by the defendant of a "red and white spotted cow," the "lined back" being a descriptive flesh mark of the stolen cow. In *Stewart v. State*, 24 Tex. App. 421, 6 S. W. 317, it was held that possession of a stolen cow, described as being red with some little white, marked with a smooth crop off her left ear, and with a white tail bush, was not shown by possession of a cow which had no crop off either ear but was marked with a split in the under part of one ear, and with a red tail. In *Roy v. State*, 34 Tex. Cr. 301, 30 S. W. 666, it was held that where the owners of seed cotton, which was stolen, could not identify seed cotton in possession of the defendants as their seed cotton and the quantity was less than the quantity stolen, that there was no such possession as would authorize a charge upon the effect of possession of recently stolen property.

c. What Must be Shown Where the Stolen Property is Money.—In *People v. Getty*, 49 Cal. 583, it was said: "The possession of money of the same kind as that which was recently stolen is usually of slight, if any, weight as evidence to prove the guilt of the person in whose possession it is found, if money of this kind is in general circulation at that place; but it is of much greater significance, when that kind of money is rarely seen in circulation at that place, and

its value as evidence is further increased when both the money found in possession of the accused and that which was stolen consists of a combination of pieces of such money, as in this case, of a large number of Chilian half ounces and a single Peruvian ounce. It strongly tends to the identification of the money as the money which was stolen, and thus to connect the defendant with the burglary": See, also, *People v. Melvane*, 39 Cal. 614. In *United States v. Candler*, 65 Fed. 308, which was a prosecution for the larceny of a postoffice, the district judge, in charging the jury, said: "The evidence shows that on the day after the robbery the defendant was arrested at Murphy and on search he was found in possession of a ten dollar gold piece and some silver change and coppers, amounting to about twenty-five dollars, but no five dollar bank bill or stamps. If any of the coin had been marked so that it could have been strictly identified as the property stolen, such fact would have given rise to a strong presumption of guilt, as the coin found upon his person was like the ordinary circulating currency of the country, incapable of strict identity, no presumption of law arises, but the fact is a circumstance which may be considered in connection with other circumstances as evidence of guilt." In *Hicks v. State*, 99 Ala. 169, 13 South. 375, which was a prosecution for the larceny of four ten dollar coins, it was held that the prosecution could show that when the defendant was arrested, the day after the larceny, he had in his possession a five dollar coin and that he handed to a companion a bag containing a ten dollar coin and ten silver dollars, there being also evidence from which the jury might infer that his money was procured in exchange for that stolen. In *Kaiser v. State*, 35 Neb. 704, 53 N. W. 610, it was sought to convict the defendant of larceny on the strength of possession of the stolen money, the court said: "No attempt was made by the state to identify the money found in the possession of the accused as that lost by Gallagher, further than as stated above. The case therefore is this: Gallagher, while intoxicated, lost a sum of money. Soon thereafter the plaintiff in error is proven to have been in possession of a sum of money corresponding in kind to that lost by Gallagher, and under circumstances tending to show that he did not come by it honestly. Circumstantial evidence to warrant a conviction should be of such a convincing character as to prove beyond a reasonable doubt that the accused, and no other person, committed the crime with which he is charged: *Walbridge v. State*, 13 Neb. 236, 13 N. W. 209; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361. Here, aside from the possession by the plaintiff in error of an unusual sum of money, there is no proof whatever to connect him with the larceny, if we assume that the money was in fact stolen from Gallagher, an assumption not fully warranted by the evidence. Not only is there a failure to show an opportunity for the commission of the crime charged, but it affirmatively appears from the testimony of the witnesses for

the state that the plaintiff in error was not at any time in company with Gallagher while the latter was in the saloon. While the evidence was admissible as tending to establish the guilt of the accused, and while it may be said to raise a strong presumption that he did not come by the money honestly, it is certainly insufficient to exclude the theory of his innocence of the crime of larceny and to establish his guilt thereof beyond a reasonable doubt." The case of *State v. Nesbit*, 4 Idaho, 548, 43 Pac. 66, is perhaps a case which illustrates the nature of the identification evidence generally used in seeking a conviction based principally upon the alleged fact of possession. The opinion sets forth the evidence in detail, but the portion quoted sets forth the essential parts. The court said: "Recurring now to the identification of the money stolen, the foregoing is all the evidence touching the identification of the money which the defendant was convicted for stealing. The evidence utterly fails in the identification of the one hundred dollar bill as the one lost by the witness Frame. Frame testified that: 'I can't say. It looks like it. It is for the same amount, but I can't say whether it is the same one or not. I am not certain about it at all.' And as to the identification of United States gold coin, he testified: 'This gold coin [referring to that taken from Nesbit, Jr., by the sheriff] here is all alike, like greenbacks, but it all looks the same as the money I saw thrown on top of the documents spoken of in the safe. It looked just the same as my money did.' This is no identification whatever of said gold coin as being that lost by the complaining witness. It is not claimed that any of the United States gold coins had any distinguishing marks on them, but it is shown that they have not. The witness testified they are all alike; that they looked like his money; not that they were his. A very weak attempt was made to point out distinguishing marks on the English sovereign and to identify it as the one claimed to have been lost by the complaining witness. The quotation from the testimony above set forth shows how utterly the prosecution failed in that attempt. The witness Frame at first attempts to identify it by testifying that 'it had a man's head on it, represented as a curly-headed man,' and 'it is worn more on the face side than on the other,' and 'it appears to be a little sprung' and 'it always felt to me like it was.' As to the man's head on one side, that is no mark of identification, for all sovereigns of that date and issue had the same; and it is not distinguishably worn on one side more than the other, and it is not sprung, but in the usual shape of such coins. The witness testified: 'I recognized this coin because it felt like the one I had. I think I could identify that sovereign by feeling of it once. This coin seems sprung. It has a hump on it, and feels different than an American coin. Mine felt the same way.' Here he seeks to identify it by feeling, and signally fails. The coin has no hump on it, but it does feel different from an American coin, and the witness swears to that, but is careful not to testify that it

feels different from other sovereigns of the same date and coinage, or that it contains a single distinguishing mark. Having utterly failed to identify the coin by any peculiar distinguishing marks, he undertook to identify it by the date it bore. He testified: 'The first time I saw it I thought the date was 1826; the next time 1836; the next time 1886,' and finally admits as follows: 'I didn't pay much attention to it.' The said sovereign is before us. It is not perceptibly worn more on one side than on the other; it is not sprung; neither has it a hump on it different from sovereigns of that date and coinage; and it is of the date of 1826, while the testimony shows that the last time Frame read the date on his coin, prior to losing, he read it 1886. It is rather surprising that witness Frame should have so completely failed to describe the sovereign, after having seen it taken from the defendant, and no doubt having carefully examined it, with a view of identifying it on the trial of this case. His eyesight and delicacy of touch or feeling must be very defective.

"The possession of the gold coin is the only circumstance shown by the evidence tending to connect the defendant with the larceny charged, and the prosecution failed to identify said coin as that alleged to have been stolen. If the prosecution had identified said coins as the ones stolen or had proved that defendant had no money prior to the theft, either would have been a strong circumstance of defendant's guilt, and would have placed upon him the necessity of showing that he came into the possession of said coins innocently. But as there was a complete failure to identify the coins as those alleged to have been stolen the jury should have returned a verdict of not guilty. The defendant must have been convicted on suspicion, as there was no legal evidence establishing his guilt, regardless of the utter want of evidence on behalf of the prosecution attempting to identify the coin.

"The defendant testified in his own behalf that he brought said gold coin from Utah, and also from whence he got it; that he had carried money several times as he was carrying that when arrested by the sheriff; that he was on his way to Utah and carried it thus for safety; that he had a small collection of old coins; and that he had had said sovereign for more than three years—and is corroborated as to these facts by his father, sister, two brothers, his betrothed, and by two other witnesses not related to him. In regard to the one hundred dollar bill, Nesbit, Sr., testified as to circumstance and date of drawing nineteen hundred dollars out of the Deseret National Bank at Salt Lake City, Utah, and that the one hundred dollar bill was a part of that money, and is corroborated as to those facts by one witness." The court then reversed the judgment of conviction and ordered that the defendant be discharged.

So, also, in *Barker v. State*, 126 Ala. 69, 28 South. 685, it was held that possession of the money of the same denomination as that stolen is merely an evidentiary fact to be taken in connection with other

State, 25 Tex. App. 666, 8 S. W. 814; *Arispe v. State*, 26 Tex. App. 581, 10 S. W. 111; *Green v. State*, 27 Tex. 570, 11 S. W. 636.

b. Effect of Explanation Showing Wrongful or Dishonest Possession.—The fact that the explanation given by the possessor of stolen goods may tend to show his guilt of some crime other than the one for which he is being tried does not detract from the force of the explanation in rebutting the inferences to be drawn from the fact of possession. Thus, in *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, it was said: "So far as the accused was required to explain his possession in order to avoid the inference of guilt, it was only necessary for him to show that he obtained it by some means not connected with the particular crime charged in the indictment; and such explanation, if believed by the jury, was sufficient to acquit him, although it may tend to show him guilty of some other crime." So, also, in *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154, it was said: "It is never incumbent on the accused to show that he obtained stolen articles honestly and legally. A guilty mode of acquiring them will be as effectual as an innocent one. Their acquisition by any means whatever other than by participating in the offense involved in the trial will be a sufficient accounting for the possession to neutralize the effect of that possession as evidence tending to prove guilt": See, also, *State v. Brady* (Iowa), 91 N. W. 801; *State v. Swift*, 120 Iowa, 8, 94 N. W. 269, to the same effect. *People v. Fagan*, 98 Cal. 230, 33 Pac. 60, was an instance where the explanation was held sufficient as to the crime of larceny, though it indicated that the accused was guilty of knowingly receiving stolen property. In *State v. Dillon*, 48 La. Ann. 1365, 20 South. 913, defendant was found in possession of a skiff, the larceny of which he was charged with, the court held that it was competent for him to explain his possession by evidence that he had taken it to escape arrest on a robbery charge and had taken a friend along who was to return the skiff. See, also, *Considine v. United States*, 112 Fed. 348, as bearing on the subject.

c. Effect of Explanation Raising Reasonable Doubt.—In *Bellamy v. State*, 35 Fla. 245, 17 South. 560, the court said: "The explanation given by the possessor of stolen goods may fall short of satisfying the jury, and yet it may be sufficient to raise a reasonable doubt in their minds and if it does raise such a doubt then it is sufficient to acquit him of the charge of larceny unless the prosecution overcomes it by proof that the explanation is false": Citing *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077. See, also, *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905; *Sahlinger v. People*, 102 Ill. 241; *State v. Miner*, 107 Iowa, 656, 78 N. W. 679; *State v. Brundige*, 118 Iowa, 97, 91 N. W. 920. So, also, it has been stated that where, after defendant's explanation of his possession, the jury have a reasonable doubt growing out of any part of the evidence, they should acquit the accused: *Hale v. State*, 122 Ala. 85, 26 South. 236; *Greutzinger v.*

State, 31 Neb. 460, 48 N. W. 148. In *State v. Lax* (N. J. Sup.), 59 Atl. 18, it was held that if a reasonable doubt is raised, even by inconclusive evidence, of the innocent possession of stolen property, the defendant is entitled to the benefit of the doubt. It was held in *Hyatt v. State*, 32 Tex. Cr. 580, 25 S. W. 291, that when the defendant gives a reasonable explanation and one which is probably true and the state fails to establish its falsity beyond a reasonable doubt, the accused must be acquitted, and in *State v. Seymour*, 7 Idaho, 257, 61 Pac. 1033, it was held that the jury cannot arbitrarily ignore a reasonable explanation of defendant's possession, where he is not impeached and there is no conflict of evidence. So, also, in *Powell v. State*, 11 Tex. App. 401, it was held that where defendant claimed to be in possession of the alleged stolen goods by consent of the owner's agent, and the state failed to call the agent to refute his explanation, though he was accessible, the conviction would be reversed. In *State v. Carr* (Del.), 57 Atl. 370, the court said: "Whenever a reasonable explanation or account of the possession is satisfactorily proven by the prisoner, it is incumbent upon the state to show that such an account is false." It was, however, held in *State v. Moore*, 101 Mo. 316, 14 S. W. 182, that defendant's explanation did not entitle him to an acquittal because it fairly accounted for the fact of his possession.

d. *Effect of False Explanation.*—In *Armstrong v. State* (Tex. Cr.), 50 S. W. 346, it was held that the mere fact that defendant's explanation of his possession of stolen property is false is not sufficient to authorize a conviction, since a defendant is not tried alone on the falsity of any explanation which he may make with reference to his possession of such property, though such false explanation may be an important circumstance against him. He is tried on the whole case made by the state. In a later case in that same state the court, in *Thompson v. State* (Tex. Cr.), 78 S. W. 941, held that the court properly refused to charge that the state could only insist on a conviction in case it had shown that the explanation given by the accused was false, since it would have been on the weight of the testimony, but that it was proper to charge that the jury could convict if they believed the explanation given to be false. The question was also discussed in *Ray v. State* (Tex. Cr.), 43 S. W. 77. In *Scott v. State*, 119 Ga. 425, 46 S. E. 637, it was held that recent possession together with a false statement as to the person from whom the stolen property was obtained, made out a *prima facie* case of larceny. A similar holding was made in *Wynn v. State*, 81 Ga. 744, 7 S. E. 689. And in *Franklin v. State*, 37 Tex. Cr. 312, 39 S. W. 680, it was held that the state could show that the explanation as to the possession of stolen property was false by circumstantial evidence.

VII. Province of Court and Jury.

The province of the court and jury has been treated in an incidental manner in discussing the various phases of the subject. The question

whether unexplained possession of stolen property raises an inference of guilt or is sufficient to establish the guilt of the possessor is for the jury: *People v. Hannon*, 85 Cal. 374, 24 Pac. 706; *Lundy v. State*, 71 Ga. 360; *State v. Walker*, 41 Iowa, 217; *Hunter v. Commonwealth*, 20 Ky. Law Rep. 1165, 48 S. W. 1077; *Commonwealth v. McGorty*, 114 Mass. 299; *State v. Hoshaw*, 89 Minn. 307, 94 N. W. 873; *Whiteman v. State*, 42 Neb. 841, 60 N. W. 1025; *State v. Hodge*, 50 N. H. 510; *Methard v. State*, 19 Ohio St. 363; *Prince v. State*, 44 Tex. 480; *Porterfield v. Commonwealth*, 91 Va. 801, 22 S. E. 352; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836. The question what time after the theft is recent is also for the jury: *Boyd v. State*, 24 Tex. App. 570, 5 Am. St. Rep. 908, 6 S. W. 853; *Willis v. State*, 24 Tex. 586, 6 S. W. 857; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378. The question whether the property found in the possession of the accused is the stolen property is also for the jury: *State v. Griffin*, 71 Iowa, 372, 32 N. W. 447; *Branson v. Commonwealth*, 92 Ky. 330, 17 S. W. 1019; *State v. Bruce*, 106 N. C. 792, 11 S. E. 475. The effect to be given to the explanation given of the acquisition of the stolen property is also a question for the jury: *York v. State*, 42 Tex. Cr. 528, 61 S. W. 125; *McCoy v. State* (Tex. Cr.), 81 S. W. 46. And in *People v. Farrington*, 140 Cal. 656, 74 Pac. 288, it was held that the demeanor of the accused when found in possession of the stolen property or when he attempted to explain was proper to be considered by the jury so far as disclosed by the evidence.

DE GEOFROY v. MERCHANTS' BRIDGE TERMINAL RAILWAY COMPANY.

[179 Mo. 698, 79 S. W. 386.]

STREETS—Rights of Abutting Owners.—The right of the owner of a lot in a city or town to the use of the street and to damages for its obstruction does not depend on his ownership of any of the soil under the street. His right flows from the fact that his lot abuts on the public street. (p. 529.)

STREETS—Abutting Owners—Easement—Compensation.—An abutting owner on a public street has an easement therein of light, air, and access to and from his property by means of such street, of which he cannot be deprived without compensation. (pp. 532, 536.)

STREETS—Surface Railroads in—New Servitude.—The construction and maintenance of a steam or street railroad on the grade of a street in pursuance of municipal authority, the municipal corporation having power to grant it is not a new or additional servitude on the land upon which the street is constructed, and falls within the use contemplated when the street was laid out or acquired by the public. (p. 536.)

STREETS—Elevated Railroads Therein—New Servitude.—An elevated steam railroad, constructed on permanent pillars or arches in a public street by consent of the municipality, so as to shut out the light and air of abutting owners and interfere with the free use of the street, and their access to and from their premises, is a new and additional servitude, and one not in contemplation when the street was acquired or laid out, and one which entitles them to just compensation for any depreciation in the value of their property caused by the construction and maintenance of such railroad. (p. 540.)

STREETS—New Servitude Therein—Limitation of Action.—An action by abutting property owners on a public street to recover for damages to their property caused by the construction of an elevated railroad therein is barred by limitation in five years after such construction has become permanent and complete. (p. 541.)

Sale & Sale and D. Goldsmith, for the appellants.

J. H. Overall, for the respondent.

701 **GANTT, J.** This is an action by plaintiffs, who are abutting owners of real estate on Front street, in the city of St. Louis, for damages to their said realty, occasioned by and resulting from the construction and operation of an elevated steam commercial railroad along and over said Front street in front of plaintiffs' lots. In the circuit court a demurrer to the petition was sustained on the ground that it did not state facts sufficient to constitute a cause of action. The propriety of that action by the circuit court presents the sole and only question for our determination at this time.

Omitting caption, the plaintiffs allege that the defendant is a railroad corporation, engaged as a common carrier, operating a steam railroad with locomotives and cars at and in the city of St. Louis. That plaintiffs are now, and for many years have been, the owners in fee simple of a lot in city block 5, fronting seventy-six feet on the west line of Wharf or Front street, in the city of St. Louis, with a depth of seventy-five feet, on which lot there were at all the times mentioned in the petition, and are now, erected three substantial four-story brick buildings, known as numbers 203, 204 and 205 South Levee or Front street. That plaintiffs acquired the said lot and premises prior to the year 1890, and have owned and occupied the same by themselves and their tenants continuously since April, 1890. That said Front street, known as the Levee or Wharf, is and was for many years prior to the construction of defendant's said railway, as hereafter set out, a public street and highway of the city of St. Louis, and held by said city in trust for the maintenance thereof as public streets are generally used and

maintained; that plaintiffs were and are seized of an easement in said street and are entitled to have the same kept and used as a public highway, and to be protected from unusual and extraordinary interferences with the light, air and access to and use of their premises not occasioned by ordinary street uses; that as an incident and ⁷⁰² appurtenant to plaintiffs' ownership of said premises, plaintiffs, at least until condemnation, compensation, or purchase, have and had in said Front street the right and easement to its free and unimpaired use, for the uses and ordinary purposes of a public street or highway, and to exemption from noise, smoke, soot, dust, cinders, obstructions and unusual impairment of the easements of light, air and access and ingress and egress to and from said premises, etc. That defendant's structure and the operation of its engines and cars on said street in front of plaintiffs' premises are of a permanent and continuous nature. The petition avers that the railroad of the defendant was an elevated road, the superstructure of which rested upon iron columns which were erected perpendicularly to a height of from fifteen to twenty-five feet above the surface of the street or sidewalk; that these columns supported cross-girders or frame work, upon which were laid four single railroad tracks, or two double railroad tracks and that the railroad of the defendant has ever since the erection of the structure been, and still is, operated upon these tracks; and that the superstructure extends out on either side, so that the western line thereof approaches the eastern or building line of plaintiffs' premises within twelve feet, more or less; that these structures are of a permanent nature, and are built and intended by the defendant to be used permanently for the transportation of freight and passengers; "that large numbers of freight and passenger trains daily pass in front of plaintiffs' premises, and produce a flickering and darkening of the light, and deprive and have hitherto deprived plaintiffs of the beneficial use of such light as comes to said premises, and interferes with the air, ventilation and access to said premises, and the privacy thereof; that said structure, as it now exists, and as above described, has been erected and maintained without legal right, and is a special injury to plaintiffs and their premises; that the operation of said railroad is not an ordinary street use of said ⁷⁰³ street authorized by law; that on the road thus constructed the defendant every day ran, and still does run, many trains of cars; that said railroad and structure greatly obstructed, and still do greatly obstruct, said premises and the

passageway to and from said building; that they excluded, and still do exclude, light and air from the same; that the trains made and still do make, loud and disagreeable noises, caused, and still do cause, vibrations of the buildings erected on said premises, whereby the security of such buildings is greatly impaired and their strength lessened and injured, and still do injure, said buildings, and said trains and said structures injure and impair plaintiffs' easements of light, air and access; that the value of the use and occupation of said premises has thereby been greatly damaged."

The petition further avers that the aforesaid structure and the railroad of the defendant impose a new and additional burden on the property of the plaintiffs, and one which was not within the power of the city of St. Louis to authorize without compensating plaintiffs for their property thus taken and damaged; that no compensation has ever been made for the aforesaid taking and damage of plaintiffs' property; that the rental value of said property has been greatly damaged, to wit, to the extent of two thousand five hundred dollars per annum, by the construction and operation of defendant's railroad in said street; and that the property itself has been permanently damaged in the sum of twenty-five thousand dollars. That the city of St. Louis did heretofore, to wit, on July 9, 1887, adopt an ordinance which undertook to authorize the construction of defendant's railroad, and the use of the streets therefor, which said ordinance is set forth in full in the petition, and which, among other things, required the construction of said railroad to be commenced within one year after the approval of the ordinance and to be completed within five years from February 3, 1887, and which said ordinance was subsequently amended by another ordinance, approved ⁷⁰⁴ December 21, 1889; that the defendant, with the view of availing itself of the provision of said ordinance and claiming to act under the same, has constructed its road as aforesaid, and that the said ordinance is in conflict with article 2, section 21, of the constitution of this state, and also in conflict with article 2, section 30, of the constitution of this state, and also in conflict with the fourteenth amendment to the constitution of the United States; "that plaintiffs' property has been taken and damaged for the uses of defendant's railroad, as herein set out, without just compensation; that plaintiffs have been deprived of their property by the defendant without due process of law"; and that the construction of the railroad of the defendant was completed in

May, 1890, and the railroad has been operated ever since that time; and that the operation of the road will continue, unless restrained by order of this court.

The petition then prays that the damages of the plaintiffs may be ascertained and determined, and that they may have judgment therefor, to wit, for the sum of twenty-five thousand dollars; also, that the defendant may be enjoined from further obstructing and encumbering the aforesaid street, and also from maintaining, continuing or operating its railroad and structure in front of the premises of the plaintiffs, and further be required to remove said structure in front of plaintiff's property, unless, within such time as should be fixed by the court, the defendant pays to plaintiffs a sum of money sufficient to compensate the plaintiffs for their property taken and for the permanent injury and damage done thereto by reason of the aforesaid acts of the defendant.

1. It is stated by counsel that the action of the trial court in sustaining the demurrer to the petition of the plaintiffs was predicated exclusively on the theory that the cause of action of the plaintiffs was barred by the statute of limitations, in that it appeared from the face of the petition that the action was not instituted within five years after the completion of the defendant's railway, ⁷⁰⁵ but this is not disclosed in the record, and we cannot take notice of the reasons which moved the circuit court to sustain the demurrer.

As said by Judge Andrews for the court of appeals of New York, in *Kane v. New York etc. R. R. Co.*, 125 N. Y. 175, 26 N. E. 278, 11 L. R. A. 640: "Few questions have come before the courts in this generation of greater practical importance or involving larger pecuniary interests than those growing out of the construction of railways in city streets. Whether such streets may, under legislative and municipal authority, be occupied by railroad tracks, to the inconvenience of abutting owners, without making compensation, and what limitation, if any, there is to the legislative power over streets which cannot be transgressed without violating the legal and constitutional rights of lot owners are questions which have excited the gravest debate and have been the subject of the most careful judicial consideration."

Rorer on Railroads, volume 1, page 515, says that "as to the right of a railroad to run along a public street without additional compensation, American authorities differ so widely that

it is impossible to lay down any positive rule of law upon the subject."

A résumé of the decisions of this court on this subject will greatly aid us in arriving at a proper conclusion.

The easement of the plaintiffs in Front street is too firmly established to admit of doubt.

In the case of Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 315, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339, McFarlane, J., says: "It must be conceded by the defendant, because it is too well settled to admit of question, that every owner of a lot abutting on a public street, besides the ownership of the property itself, has rights appurtenant thereto, which form a part of the estate. Those rights are said to be 'as much property as the lot itself.' Of these may be named an easement for the free admission of light and ⁷⁰⁶ pure air; and the right of ingress and egress to and from his property. 'Every lot owner has a "peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises," which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be the owner.' Depriving the owners of these incorporeal hereditaments, or interfering with their full enjoyment, by appropriating the street to a new and different public use from that originally contemplated, would undoubtedly be a damage within the foregoing constitutional provision. . . . We think a public use which would interfere with these incorporeal rights, whereby the property was depreciated in value would be a damage to the property within the meaning of the constitution, and would entitle the owner to compensation." To the same effect: Knapp, Stout & Co. v. Transfer Ry. Co., 126 Mo. 35, 28 S. W. 627; Sherlock v. Kansas City etc. Ry. Co., 142 Mo. 182, 64 Am. St. Rep. 551, 43 S. W. 629; Egerer v. New York Cent. R. R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381; Sperr v. Metropolitan etc. Ry. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752.

In some of the states the right of the abutting owner to compensation by reason of the construction of a steam railroad in front of his premises has been made to depend upon whether the fee in the street was located in the municipality, or the

abutting owners, but in this state the right of the owner of a lot in a city or town to the use of the street and to damages for its obstruction does not depend on his ownership of any of the soil under the street. His right flows from the fact that his lot abuts on a public highway: *Lackland v. North Missouri R. R. Co.*, 31 Mo. 187.

At an early day in the judicial history of this state it was ruled that the laying of tracks and the operation of a steam railroad on the grade of a public street or ⁷⁰⁷ highway did not constitute a new or additional servitude, and did not warrant compensation for damages resulting to the owners of abutting property. While this is true, as was said by this court in *Knapp, Stout & Co. v. Transfer Ry. Co.*, 126 Mo. 36, 28 S. W. 627, it was a modified rule," "a rule that has been hedged about with many qualifications."

Thus in the very first case (*Lackland v. North Missouri R. R. Co.*, 31 Mo. 188) it was said: "We have not observed any case, even where this power is conceded, which allows the erection of depots, or car buildings, or any other structures, which materially obstruct the use of the street or highway as a public easement."

In that case it appeared that the company built a sidetrack along the main track in the street fronting the plaintiff's lot and a switch track connecting the two others; that these tracks rested on embankments which of themselves entirely obstructed all passage of vehicles over any part of the street. In addition to the three tracks, two switch frames and a cattle-way had also been erected. The sidetrack was used for a standing place of freight and passenger cars. In short, the street was used as a depot yard. Judge Napton, in the course of the opinion, referred to the decision of the supreme court of Pennsylvania in *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 351, 67 Am. Dec. 471 (a court which has maintained at all times the absolute control of the state over all its highways), wherein it was ruled that a grant of right of way over and along streets, highways, etc., but with the restriction "not to obstruct or impede their free use," did not authorize the company to place any material obstructions in the streets or highways, and any change of grade, unless the road or street was adapted to the new grade at the expense of the company, was unauthorized, and this court in said *Lackland* case affirmed a judgment for damages growing out of the said acts of the railway company.

In *Porter v. North Missouri R. R. Co.*, 33 Mo. 128; the opinion proceeded ⁷⁰⁸ on the ground that the plaintiff's access to his property was not affected by the construction of the road at grade.

In *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149, the *Porter* case came under review, and it was held that the principles announced therein only applied to a railroad constructed on the grade of the street where the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for sidetracks or other structures for the convenience of the railroad, and accordingly in the *Tate* case damages were allowed the abutting owner where the railroad company built an embankment in the street in front of the plaintiff's lot. To the same effect is *Swenson v. City of Lexington*, 69 Mo. 166; *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 322; *Smith v. Kansas City etc. Ry. Co.*, 98 Mo. 24, 11 S. W. 259; *Dubach v. Hannibal etc. R. R. Co.*, 89 Mo. 488, 1 S. W. 86.

In *Schopp v. City of St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783, this court held that an abutting owner on a street has equal right with the public to use the street, and in addition thereto, he has certain rights which are special to himself, e. g., that of ingress and egress, and that the city has no power to lease spaces on a street in front of a business house for produce dealers. Judge Black for the court, speaking of the building of market-houses in the streets of a city, quotes Judge Dillon to the effect that "they are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons" (Dillon on Municipal Corporations, 4th ed., sec. 383), and says: "The public highways belong, from side to side and end to end, to the public"; and "The public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it, not in the actual use of some other traveler, . . . and the abutting property owner has the right to the free and unobstructed passage to and from his property."

In *Lockwood v. Wabash Ry. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516, it was pointed ⁷⁰⁹ out that section 2543 of the Revised Statutes of 1889, now section 1035 of the Revised Statutes of 1899, provides that when a railroad builds its tracks in a public street by permission of the city authorities it must restore the street to its former

state, or to such a state as not necessarily to impair its usefulness, and that the mayor and assembly of the city are restricted in their grant by the constitution and laws of the state.

In that case, while the court felt constrained by the unbroken line of decisions to the effect that a city in this state may permit and authorize by ordinance the laying of a railroad track at grade along its streets, it held that this was not an unqualified power, and consequently ruled that while the railroad was laid at grade, yet owing to the narrowness of the street and the width of the tracks, the use of the street by the railroad company amounted to a monopoly and exclusive use of the street by the company to the denial of the rights of the abutting owners, and was in effect a taking and damaging their property without compensation, and accordingly affirmed the decree of the circuit court perpetually restraining the company from operating its cars and locomotives on said street.

In *Knapp, Stout & Co. v. Transfer Ry. Co.*, 126 Mo. 37, 28 S. W. 627, the *Lockwood* case was approved, and this court, after reviewing all the above cases perpetually enjoined the defendant railroad company from operating a switch track in Hall street in St. Louis in front of plaintiff's property and on what would have been the west sidewalk had one been constructed. Judge Black, speaking for this court, said: "Taking these cases all in all, it is very clear a municipal corporation has no power to grant to a railroad company such use of a street as will destroy its usefulness as a public thoroughfare, or destroy or unreasonably interfere with the right of an abutting property holder to access to and from his property."

⁷¹⁰ The petition in the present case presents sharply for the first time in this court the rights of an abutting owner to compensation for the new and additional servitude to which a street in front of his property has been subjected by the construction and operation of an elevated railroad thereon on a permanent structure, such as is described in plaintiff's petition.

Starting with the unquestioned easement which the plaintiffs have to light and air and access to and from their buildings and the adjudications of this court already reviewed can it be said that the proposition is *stare decisis* and that plaintiffs are precluded from recovering compensation because the defendant's railroad is not a new or additional servitude? Our opinion is that there is nothing in our decisions up to this time that precludes a recovery and the point is before us for adjudication in the light of reason and the analogies of the law.

The question is not a new one in our sister states. Thus in New York the question arose in *Story v. New York etc. Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146. The case is notable, not only on account of the question involved and the thoroughness with which it was considered but the ability of the counsel who argued it. In that case the trial court found that "the structure of elevated railroad in that case would to some extent obscure the light of the abutting premises; that the passing trains would do this also and would impair the usefulness of the plaintiff's premises; that the line of columns abridges the sidewalks and interferes with the street as a thoroughfare where such columns are located; that the fronts of the buildings will be exposed to observation from passengers in passing trains and their privacy invaded and these things will be of a continuing character." We quote this finding because it is practically the very things of which plaintiffs in this case complain. Danforth, J., who delivered the majority opinion, assumed as the basis of his opinion that the fee to the street was in the city, and ⁷¹¹ thus, in this respect, the opinion is in harmony with our own on this subject, viz., that irrespective of the title in the street, the abutter had the easement of air and light and access to and from the street until by legal process and upon just compensation, it was taken from him. While conceding that a railroad on grade was not a new servitude, the court said: "Can the street be lawfully appropriated to such a structure (as this) without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure, without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns, or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage-way at fifteen feet above the bed of the street, one may be authorized which spans the entire street, from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles." Tracey, J., concurring, further said: "The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate

trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application ⁷¹² where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiffs' grantors, and in respect to lands acquired under the act of 1813 violates the trust for which such lands are held for public use." The conclusion was that an abutting owner had an easement in the street which constitutes private property of which he cannot be deprived without compensation; that such a structure as that described in plaintiffs' petition is inconsistent with the use of Front street as a public street; that the plaintiff was entitled to an injunction until compensation had been paid therefor.

⁷¹³ In *Lahr v. Metropolitan etc. Ry. Co.*, 104 N. Y. 288, 10 N. E. 528, the court of appeals expressed the opinion that the defense had been conducted with a view to have the *Story* case overruled or limited. The court reaffirmed the *Story* case, and deduced therefrom the following principles: "We hold that the *Story* case has definitely determined:

"1. That an elevated railroad in the streets of a city, and operated by steam power, and constructed as to form, equipment and dimensions, like that described in the *Story* case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"2. That the abutters upon a public street . . . acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street, for the benefit of property situated thereon.

"3. That the ownership of such easement is an interest in real estate constituting property within the meaning of that term, as used in the constitution of the state, and requires compensation to be made therefor, before it can lawfully be taken from its owner for a public use.

"4. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam-engines generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

In *Sheehy v. Kansas City etc. Ry. Co.*, 94 Mo. 574, 4 Am. St. Rep. 396, 7 S. W. 579, this court expressly ⁷¹⁴ approved the decision in *Story v. New York etc. Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, saying that "a railroad company which had the right conferred on it to alter the grade of the street for the purpose of constructing its road, would also be liable to an abutting property owner for damages to his property by reason of such alteration. In such case the privilege granted the railroad 'would be yoked with a liability.' That the owner of property abutting in a street has such an easement therein as would sup-

port an action for damages peculiar to him is sustained by the following cases: *Lackland v. North Missouri Ry. Co.*, 31 Mo. 180; *Story v. New York etc. Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146."

In *Doane v. Railroad*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97, while denying a remedy by injunction on the ground that the city of Chicago was the owner of the fee in its streets and was empowered to permit the railroad company to build an elevated street railway therein, the decision throughout recognizes the right of an abutting owner to damages at law, and because he had a complete legal remedy for the damages resulting to him as an abutting owner, relief in equity was denied.

In *Rude v. City of St. Louis*, 93 Mo. 413, 6 S. W. 258, this court, after reviewing the prior cases in this court on the question, said: "These cases recognize the right of a railroad company to lay down and use its tracks upon a street, when that right is conferred upon it by the municipality, the municipality having the power delegated to it to grant that right; still the track must be laid upon the grade of the street and the railroad so used as not to unreasonably deprive the owner of the property of the use of the street."

From these cases we deduce the following propositions:

1. The owner of property abutting on a public street or highway in this state has an easement in such street of air, light and access to and from his property by said street, whether the fee to the same is in the municipality or the abutting owners, and this easement is property ⁷¹⁵ of which he cannot be deprived without just compensation.

2. That the construction and maintenance of a steam or street railroad on the grade of such street in pursuance of municipal authority, the municipal corporation having power to grant it, is not a new or additional servitude on the land upon which the street is constructed, but falls within the use contemplated when the street was laid out or acquired by the public: *Porter v. North Missouri Ry. Co.*, 33 Mo. 137.

3. That the power of a city or other municipal corporation in Missouri to authorize the construction of railroads in the public streets is "a modified right, a right hedged about with many qualifications"; that it does not include the right to grant a railroad the exclusive use of the surface of a street even when laid at grade: *Lockwood v. Wabash Ry. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516;

Sherlock v. Kansas City etc. Ry. Co., 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; Knapp, Stout & Co. v. Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627; Lumber Co. v. St. Louis etc. Ry. Co., 129 Mo. 455, 31 S. W. 796; Corby v. Chicago etc. Ry. Co., 150 Mo. 457, 52 S. W. 281. Neither can the municipal authority grant the power to a railroad company of such use of a street as will destroy or unreasonably interfere with the right of an abutting property holder of access to or egress from his property or deprive him of his easement of light and air from the street. The street on which a railroad is constructed on the grade cannot be used for sidetracks, the storing of cars, for water-tanks or like structures: Lackland v. North Missouri Ry. Co., 31 Mo. 188; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Spencer v. Metropolitan Ry. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668.

4. That the right to construct a railroad in a public street at grade by authority of municipal grant has been too long acquiesced in and too many rights have been vested on the faith of the decisions affirming such right to question such a right to acquire on the faith of such adjudication.

5. That whether an elevated railroad, constructed on permanent pillars or arches in the street so ⁷¹⁶ to shut out the light and air of abutting owners and interfere with the free use of the street and their access to and from their premises, is a new and additional servitude, and not in contemplation when the street was acquired or laid out, is an open question in this state and one which we are at liberty to decide on reason and the analogies of the law.

On the part of the plaintiffs we are not asked to reverse the unbroken line of decisions in this state which hold that a steam or street railroad constructed and maintained on the grade of a street by authority of municipal authority duly delegated is not a new and additional servitude; neither is it insisted that the municipal authority may not grant an elevated railroad the right to occupy a street subject to its liability to pay abutting owners damages for injuries to their easement as abutters on such street.

But they do contend that this court has not gone to the extent of holding that an elevated railroad, built on permanent structures in a public street which interfere with, and deprive the owners of, their easement and free access to and from buildings and deprive them of light and air, is not an additional servitude and one not contemplated when the street was established and

laid out. They insist that the logic and reasoning of our decisions on the contrary lead to the conclusion that such structures as those described in their petition are inconsistent with the original dedication of the street and are such an injury to the abutting property owners as entitles them to damages therefor.

On the other hand, defendants assert that the construction of an elevated street or steam railroad on a street differs from one constructed on the grade of the street in degree only, and not in principle; that the principle upon which our decisions hold that a railroad built on the grade is not a new servitude, is not that they do not in fact inconvenience and damage the abutting owners, and depreciate their property, but is that ⁷¹⁷ the city has the right to apply the street to any public service which will not destroy it as a highway or as a means of egress or ingress to and from the abutting property, and that all other resulting damages are only such as were contemplated in the original dedication of the highway, whether by donation, purchase, or condemnation—that a long freight train passing on grade might make as much noise, emit as much smoke, and raise as much dust, as a train on an elevated road; and that an elevated road does not destroy the street as much as a surface road.

That the expression that “a city may authorize a steam railroad to be built on the grade of a street” is not a careless one, we think every decision of this court in which it is used will demonstrate. It is used advisedly, and in contradistinction to a road built on an embankment or in an excavation. As said by Judge Black, the right to build a steam railroad in a street is “hedged about with many qualifications,” and one is, “that if built otherwise than on the grade, it is an unwarranted interference with a highway dedicated to the use of the traveling public, and with the rights of property owners abutting thereon.

In the Story case (90 N. Y. 122, 43 Am. Rep. 146), the distinction was made between a surface railroad and an elevated road on a public street. In the former, no part of the street was rendered impossible of passage with any vehicle or by any wayfarer or traveler; there was nothing exclusive in its use of the street. The rails being on grade, did not obstruct the passage of any other vehicles along or across the tracks, and the delay by the passage of trains was no greater than that occasioned by vehicles and carriages of private citizens to which, of course, every person using the streets must submit, whereas an elevated railroad built and constructed on a superstructure supported by heavy and permanent pillars of iron, stone or

brick, constitutes a permanent perversion of the use of the street, in that the space it occupies with the pillars ⁷¹⁸ is permanently diverted from use by the public, to which it was originally dedicated, to the exclusive use of the railroad, and deprives the public of that free and unobstructed use of the street "from end to end" and from "side to side" to which it is entitled, and seriously impairs the easement of free and uninterrupted passage and circulation of light and air to which the abutting owners are entitled.

The doctrine thus announced has been adhered to in all the subsequent cases in New York: *Lohr Case*, 104 N. Y. 288, 10 N. E. 528; *Kane Case*, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640.

In *Fobes' Case*, 121 N. Y. 505, 23 N. E. 919, 8 L. R. A. 453, Judge Peckham reviewed the *Story case*, and pointed out that prior to the *Story case* that court had held, as we have held in Missouri, that a surface railroad was not a new servitude, and that as to surface railroads the *Story case* did not overrule or change the law in regard to railroads laid on the grade, but "embodied the application of what was regarded as well established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant, and such permanent obstruction and total and exclusive use, it was further held, amounted to a taking of some portion of plaintiff's easement in the street for the purpose of furnishing light, air and access to his adjoining lot. The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from plaintiff some portion of the light and air which otherwise would have reached him and, in a degree very appreciable, interfered with and took from him his facility of access to his lot, such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the ⁷¹⁹ day or night. Such a permanent, total, exclusive and absolute appropriation of a portion of a street as this structure amounted to was held illegal and wholly beyond any legitimate or lawful use of a public street." He says further on: "In the *Story case* it was argued that no real distinction in principle existed between a steam surface and an elevated

railroad resting on such a structure as was proved in that case. This court, however, made the distinction," and held "that it was so real and tangible in fact as to call for a different judgment than would have been proper in the case of the ordinary steam surface railroad." What was then said was reasserted in *Sperb v. Metropolitan etc. Ry. Co.*, 137 N. Y. 155, 52 N. E. 1050, 20 L. R. A. 752, and in which it was added: "The doctrine of the elevated railway cases has been of steady and consistent growth, since its rise in the decision of the *Story case*." The last-mentioned case was decided by a divided court, but all of that court has subsequently concurred in that doctrine.

When it is considered that the court of appeals of New York held, and still holds, just as this court has always held, that a surface railroad is not a new servitude on the street, but distinguishes an elevated from a surface railroad, its opinions are entitled to great consideration on a question which originated in that state, because the city of New York was the first to authorize an elevated road on its public streets. Upon fundamental principles, the right of easement by the abutting property owners, the nature and purpose of a public street, the permanent and obvious nature of the injury to the abutting property by the construction of such a structure as plaintiffs describe in their petition, renders it a new and additional servitude. We think the distinction between the fitful, intermittent use of a street by a surface railroad and the permanent exclusive use of the same by an elevated railroad, shutting out the air and light and interfering with that free access which every abutting owner has to and from the street, is too ⁷²⁰ plain to be obscured or disregarded, and that it is pro tanto a taking of plaintiffs' easement within the meaning of our constitution and laws, and entitles them to compensation therefor.

It is true that some very able courts and law-writers, notably the supreme court of Minnesota, in *Lamm v. Chicago etc. Ry. Co.*, 45 Minn. 78, 47 N. W. 455, 10 L. R. A. 268, and *Wood on Railroads*, volume 1, page 778, find difficulty in reconciling the doctrine of the *Story case* with the former decisions of the New York court as to surface railroads, but it seems to us that the essential difference is that urged by Judge Danforth, to wit, "the change of grade by permanent structures which result in the injury to, or destruction of the abutting owner's easement." Were it a new question, we would be greatly inclined to say that a steam railroad emitting steam, smoke, and cinders in front of an abutter's property was a servitude never contemplated in

the establishment of the street, but the rule to the contrary, as already said, has been too long maintained, and too many rights have been vested on the faith of it, for the courts now to disturb it, but there is no sound argument or reason, in our opinion, for extending it one whit further than we have heretofore gone.

Our conclusion is that the plaintiffs state a good cause of action and one entitling them to damages, irrespective of sections 6116 and 6117 of the Revised Statutes of 1899, which in our opinion did not change the law as to railroads constructed on the grade or surface of the street, as was ruled in *Ruckert v. Grand Ave. Ry. Co.*, 163 Mo. 260, 63 S. W. 814, and *Negel v. Lindell Ry. Co.*, 167 Mo. 89, 66 S. W. 1090.

2. But conceding that plaintiffs had a cause of action, the question arises on the face of the petition whether that action is not barred by our statute of limitations.

721 The defendant's structure is of a permanent character, and the injury to plaintiffs' property was susceptible of ascertainment when the said superstructure and railroad was completed in 1890 as alleged in the petition.

In *Howard Co. v. Chicago etc. R. R. Co.*, 130 Mo. 652, 32 S. W. 651, this court said: "While there is some conflict between the American cases on this subject, the rule sustained by the great weight of authority seems to be that when by wrongful acts a permanent nuisance is created and the injury therefrom is direct, immediate and complete, so that the damages can be immediately measured in a single action, the statute will begin to run from the erection of the nuisance. On the other hand, when the injury, as in this case, is not complete, so that the damages can be measured at the time of the creation of the nuisance in one action, but depends upon its continuance and the certain operation of the seasons or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom": Citing cases, among others, *James v. Kansas City*, 83 Mo. 567.

In *James v. Kansas City*, 83 Mo. 567, it was said: "Where the damage is complete by the original act of trespass, the statute begins to run from that time." In this case the structure was permanent and complete in 1890. The theory of the plaintiffs is that they were entitled to damages for the construction of such permanent structure, and that theory is correct, and hence they were required to bring their action within five years after its completion.

Their damages could have been estimated in one action, at that time, and the five years' limitation must and does control: Rev. Stats. 1899, sec. 4273, 4th clause; *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

It followed that the plaintiffs were barred when they commenced their action, and on this ground alone the judgment of the circuit court must be, and is, ⁷²³ affirmed.

Robinson, C. J., Burgess and Fox, JJ., concur in toto.

Marshall, J., concurs in separate memorandum.

Valliant, J., dissents as to first paragraph of the opinion, but concurs in second paragraph.

MARSHALL, J. I concur in the result, and am of opinion that all steam railroads on a public street are an additional servitude, and when constructed on the grade, necessarily destroy the street for ordinary street purposes, but the elevated roads are not as injurious to abutting property as grade roads, as is shown by the grade road on Poplar street and the elevated road on Front street, in St. Louis. I am further of opinion that if the matter as to surface steam roads was not settled by the doctrine of *stare decisis*, they ought not to be allowed on the streets of a city.

DISSENTING OPINION.

VALLIANT, J. This court has in numerous decisions, beginning in 1862 with *Porter v. North Missouri Ry. Co.*, 33 Mo. 128, and ending in 1902 with *Nagel v. Lindell Ry. Co.*, 167 Mo. 89, 66 S. W. 1090, said that it was lawful for a city to authorize the construction and operation of a railroad in a street, and that such a use of the street was not a new servitude. Under these decisions, street railroads and steam railroads have been constructed and operate in the streets of all the cities in this state, and in many instances the value of property abutting the streets so used has been destroyed or greatly impaired; yet the court has said that the owner of the property has no remedy.

An elevated railroad in a street may, in point of fact, according to the particular circumstances, be more or less destructive of the value of the property than a surface road, but in point of law there is no difference between the right to subject the street to the servitude of a railroad on the surface and to that of a railroad on an elevated structure. If the one is

not a new servitude, ⁷²³ the other is not; the principle is the same in both cases. If the court is now of the opinion that its former decisions were wrong, it would be better now, at this late date, to say so. But as long as we uphold our former decisions, we cannot, in my opinion, with consistency, say that an elevated railroad is a new servitude.

For this reason I am unable to concur in the first paragraph of the opinion in this case.

Abutting Lot Owners on a City Street have a right to easements of access, light, and air which cannot be taken for private use on any terms or under any conditions: *Townsend v. Espstein*, 93 Md. 537, 49 Atl. 629, 52 L. E. A. 409, 86 Am. St. Rep. 441, and see the cases cited in the cross-reference note thereto; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144; *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305, 63 N. E. 302, 57 L. E. A. 508; monographic note to *Wright v. Austin*, ante, pp. 102-113. As to the application of this doctrine to the case of elevated railways, see the note to *Field v. Barling*, 41 Am. St. Rep. 325.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

KIPP v. BURTON.

[29 Mont. 96, 74 Pac. 85.]

EXECUTIONS, VOIDABLE—Amendment of.—Under a statute providing among other things that a writ of execution must be issued in the name of the state, sealed with the seal of the court, and subscribed by the clerk thereof, the failure of the latter to affix the seal of the court is a mere clerical error, which renders the execution voidable only and leaves it subject to amendment. (p. 550.)

EXECUTIONS, VOIDABLE—Curative Statute.—A sale made under an execution defective and voidable by reason of its failure to contain the seal of the court, made prior to the enactment of a statute providing that all judicial sales of real property previously made on proceedings to satisfy valid judgments, shall be sufficient to sustain a sheriff's deed based on such sale, is validated by such statute, without amendment of such execution by the court. (p. 550.)

McHatton & Cotter, for the appellants.

C. M. Parr, for the respondent.

²⁸ **POORMAN, C.** In this action plaintiff obtained judgment against defendant Burton for the sum of three hundred and sixty-four dollars and fifteen cents, and costs, on April 9, 1896. Thereafter, on April 16, 1896, a writ of execution was issued on said judgment, which writ was correct in all respects so far as the questions here presented are concerned, except that the seal of the court was not placed thereon. On May 11, 1896, the sheriff returned the writ with the indorsement that he had made the amount thereof by selling certain real estate of the defendant. On December 22, 1900, the plaintiff served notice on defendant that he would, on December 26, 1900, move

the court to amend the writ of execution by ordering the seal to be placed thereon. At the hearing of this motion on said twenty-sixth day of December, 1900, the defendant appeared specially by her attorney "for the purpose of objecting to the jurisdiction of the court to make the order asked for, and upon the further ground that no notice of the said application had ever been served upon defendant or her attorneys." These objections were by the court overruled, "and thereupon the court immediately made an order, and had the same entered of record in the minutes, authorizing and directing the clerk to attach to the said pretended execution the seal of said court." To this action of the court the defendant ⁹⁹ excepted. From this order so made this appeal is prosecuted.

1. The respondent asks to have this appeal dismissed for the reason that the record contains no copy of the order appealed from. The record presented to this court shows that there is no merit in the motion. It should, therefore, be overruled.

2. The appellant contends that the court erred (1) in permitting said execution to be amended by attaching the seal thereto; (2) in ordering or directing that the seal be attached to the pretended execution nunc pro tunc, and (3) in holding that it had jurisdiction to make the said order.

The first question to be considered—and which we deem the vital question in this case—is whether the writ of execution so issued without the seal was void, or merely voidable. If it were void, it could not be amended, for that which is void is not the subject of amendment. If, however, the writ was merely voidable, it could be amended, provided that the amendment was made within the proper time and in the proper manner.

On this question the authorities are in irreconcilable conflict. One line of decisions holds that the common-law rule that an unsealed writ is void should prevail. The other line of decisions maintains that the omission of the seal is a misprision, and may be remedied by amendment. The code provisions relative to the form and contents of a writ of execution, so far as material here, are found in section 1211 of the Code of Civil Procedure, and are as follows: "The writ of execution must be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk, and must be directed to the sheriff, and must intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof, and the

amount actually due thereon, and shall require the sheriff substantially as follows," etc. Appellant refers to the discussion in *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, as sustaining the contention that the writ in this case is void. The question before the court in that case was whether a summons¹⁰⁰ not containing the seal of the court was void. The court, in the discussion of the principle involved, stated that the statute, in requiring a summons to be issued under seal, did not change the common law, and then called attention to *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. This latter case went up from the state of Indiana in 1867. The point decided was that an unsealed order of sale was void by reason of the common law; but in *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213, decided in 1877, it was held that an unsealed order of sale was amendable by reason of the provisions of the statute of 8 Henry VI, chapter 12, which was at that time in force in that state; and in *Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433, the same court says: "While there is much conflict in the authorities upon this subject, the better opinion is that the failure to attach the seal of the court to an execution does not render it void." It is apparent that it was not the intention of the court in *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, to establish the general doctrine that all writs must be issued under seal, but that reference was made to *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948, as sustaining the position that the summons must be so issued; for, if a court holds that a subsequent writ must be sealed, it is apparent that the same court would hold that the summons—the original writ, the jurisdictional writ—must likewise be sealed. This construction of the decision in *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, and the fact that the court had in mind that a distinction exists between a summons and subsequent writs, are gathered from the closing paragraph of the decision, which is as follows: "We hold in the case at bar that the summons—the jurisdictional writ—under the law and decisions in force and controlling in this jurisdiction at the time of its issuance was void, because not issued under the seal of the court. If this case involved a defective process, issued subsequent to summons, and the acquiring of jurisdiction by the court thereunder, then the contention of respondents that such defect or irregularity could be amended or disregarded might be urged with great force."

Under the Wisconsin statutes, courts are required to disregard ¹⁰¹ any error or defect in any proceeding not affecting a substantial right: Wis. Rev. Stats. 1898, sec. 2829. Power is given at any stage of the action, before or after judgment, in furtherance of justice, to amend any process by correcting a mistake in any respect: Wis. Rev. Stats. 1898, sec. 2830. Under this statute the court, in *Corwith v. State Bank of Illinois*, 18 Wis. 560, 86 Am. Dec. 793, says: "The neglect of the clerk to affix the seal of the court to the writs did not render them void. It was a defect which could be cured by amendment. . . . The seals were affixed to the executions by an order of the court before this motion was made to set aside the sales." These statutes of Wisconsin under which this decision was rendered are substantially the same as sections 774 and 778 of our Code of Civil Procedure.

In *Wolf v. Cook*, 40 Fed. 432—a case originating in Wisconsin, and carried to the federal court, involving the question as to whether the omission of a seal from a writ of attachment rendered the writ void or voidable—the court says, in discussing the question with reference to the Wisconsin decision above referred to, and the case of *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948: "It is, however, insisted that, the writ being absolutely void under the rule of the federal court in *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948, there was nothing to amend. . . . Here is a writ that, abiding in the state court, was not void; merely defective and amendable. . . . By the simple process of removal of the cause to the federal court because of the diverse citizenship of the parties, that which was valid and effective becomes void. . . . The executive officer of the state court, who, prior to the removal of the cause, was justified in the execution of the writ, by the mere act of removal becomes a trespasser ab initio. It would require a precise declaration of superior and constraining authority to require me to hold to such absurdity. I do not so read the decision in *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948. There no question of inherent power to amend or of curative statutes was invoked. Indeed, the statute authorizing amendment of process by the federal courts (U. S. Rev. Stats. 948, U. S. Comp. ¹⁰² Stats. 1901, p. 695) was enacted subsequently to that decision. ¹⁰² The court, in its opinion, refers to the case of *Overton v. Cheek*, 22 How. 46, 16 L. ed. 285, holding that a writ of error was void for want of a seal. Yet since the statute (Act June 1, 1872, c. 255, sec. 3, 17 Stats. 197) it has been ruled by that

court that a writ of error may be amended where the seal to the writ is wanting: *Semmes v. United States*, 91 U. S. 21, 24, 23 L. ed. 293. The ruling of *Pomeroy v. Bank*, 1 Wall. 592, 17 L. ed. 638, cited in *Insurance Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948, that a bill of exceptions must be under the seal of the judge, would seem overruled by *Generes v. Campbell*, 11 Wall. 193, 20 L. ed. 110, but upon other grounds than here considered. In *Tilton v. Cofield*, 93 U. S. 167, 23 L. ed. 858, the court cites approvingly the case of *Talcott v. Rosenberg*, 9 Abb. Pr., N. S., 287, holding that a writ may be amended by adding the seal. . . . In such case the federal courts follow the construction of the state statute, declared by its court of last resort: *Bacon v. Insurance Co.*, 131 U. S. 258, 9 Sup. Ct. Rep. 787, 33 L. ed. 128; *Duncan v. Gegan*, 101 U. S. 810, 25 L. ed. 875." These federal decisions and the Indiana decision in *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213, all rendered subsequent to the decision in the *Hallock* case, would seem to render that case inapplicable to a state having a statute permitting amendments to judicial processes.

In *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906, the court holds that an order of sale issued without the seal of the court is void. This holding, however, is by reason of the constitutional provision which requires all writs to be issued under the seal of the court. However, in *Taylor v. Buck*, 61 Kan. 694, 78 Am. St. Rep. 346, 60 Pac. 736, the court holds that an execution properly authenticated with the seal of the court, but lacking the signature of the clerk, is voidable, and may be amended, and places the decision upon the ground that, while a seal is a constitutional requirement which the legislature cannot alter, the signature of the clerk is a statutory requirement, which may be waived by curative statutes.

¹⁰³ 3. It is contended that the reasoning in *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, is applicable to the case at bar. We cannot agree with this contention. There is a distinction between a summons and a writ of execution, and by reason of that distinction the cases of *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, and of *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558, are not in point in this case. A summons is issued at the instance of the plaintiff, without any previous action on the part of the court. It is not necessary that it be served by an officer of the court: Code Civ. Proc., sec. 635. The court has no jurisdiction of the defendant until

the summons is served, and under the decisions in *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424, and *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558, the defendant cannot be put to the costs and trouble of appearing in court until served with a summons which complies with these specific provisions of law. An execution follows a judgment. The defendant has been in court. The subject matter has been litigated. The court had jurisdiction. It has been judicially determined that the defendant is justly indebted to plaintiff in a specific sum. It is the duty of the defendant to pay this sum. He did not pay it, and by authority of the court a writ of execution is issued by one official of the court (the clerk), directed to another official of the same court (the sheriff), commanding him to subject the property of the defendant to the payment of the judgment which by other provisions of law is a lien on his real estate, and which it is his duty to pay. The writ of execution is no more jurisdictional than are other orders made and writs issued in the case subsequent to the summons. The court obtained jurisdiction of the subject matter of the action by the filing of a proper complaint, and of the defendant by the service of a valid summons. Nothing remained over which to acquire jurisdiction. The execution was not jurisdictional. It was only a procedure in the case, its sole function being to carry into effect the judgment of the court. The omission of the seal therefrom did not of itself mislead or injure defendant. The law does not require a copy of the writ to be served upon him. The error in not affixing the seal was an error on the part of an officer of the court acting in a ministerial capacity.

¹⁰⁴ The statute is as imperative with reference to the requirement that the amount due shall be stated in the execution as it is with reference to the provisions relating to the seal, yet this court, under a similar statute, held in *Roush v. Fort*, 2 Mont. 482, that an execution directing levy for more than the judgment called for was amendable (*Codified Stats. 1871-72, sec. 251, p. 80*), and this appears to be the universal doctrine: *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954. Executions failing to comply with other positive requirements of the statute have been held amendable: *Hibberd v. Smith*, 50 Cal. 511; *Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302; *State v. Cassidy*, 4 S. Dak. 62, 54 N. W. 928. The provisions of the statutes of amendments (*Code Civ. Proc., secs. 774, 778*) are of as commanding

authority as section 1211 of the same code, and are as imperative in their directions; and all these sections should be taken into consideration in determining a question of this kind. These considerations lead to the conclusion that the writ of execution issued in this case was not void, but voidable; and in support of this position we cite the following cases, not heretofore referred to in this discussion: *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84, 6 S. W. 510; *People v. Dunning*, 1 Wend. 17; *Wright v. Nostrand*, 94 N. Y. 31; *Dever v. Akin*, 40 Ga. 423; *Lowe v. Morris*, 13 Ga. 147; *Mitchell v. Duncan*, 7 Fla. 13; *Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842; *Sawyer v. Baker*, 3 Me. 29; *Porter v. Haskell*, 11 Me. 177; *Freeman on Executions*, 3d ed., 70 et seq.; *Bailey v. Smith*, 12 Me. 196; *Arnold v. Nye*, 23 Mich. 286; *Witherel v. Randall*, 30 Me. 168.

4. The act of March 1899 (Laws 1899, p. 145), contains the following provision: "Sec. 2. All judicial sales of real property heretofore made in this state on proceedings to satisfy valid judgments or decrees of any court, and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such ¹⁰⁵ sale, and when no such deed has been executed, shall entitle such purchaser to such deed; and such deed when executed, shall be sufficient to convey all the title of the judgment debtor in the premises so sold to the purchaser at said sale, and all defects and irregularities in the issuance of execution, or the manner of making or conducting the sale, shall be disregarded." The effect of this law is to cure the defect in this execution, and render the sale had thereon valid. It is immaterial what action was taken by the court with reference to amending this writ at any time subsequent to the enactment of the law above quoted. The writ was made valid by that law without amendment, and the other assignments of error are immaterial.

We recommend that the order in the case be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the order appealed from is affirmed.

AMENDING WRITS OF EXECUTION.

- I. Power of is Liberally Exercised, 551.
- II. Practice to be Pursued in Procuring Amendments, 552.
- III. Power Extends to All Matters of Form, 553.
- IV. Amending Direction to the Officer, 554.
- V. Amending Omission in Words of Command, 555.
- VI. Amending to Conform Execution to Judgment, 555.

- VII. Amending Error in Designating the Return Day, 556.
- VIII. Amending the Clause of Attestation, 556.
- IX. Amending by Affixing Seal, 558.
- X. Time Within Which Amendment may be Made, 558.
- XI. The Effect of Amending, 559.
- XII. Effect of not Amending, 561.
- XIII. Persons Against Whom Amendments may be Made, 561.

I. Power of is Liberally Exercised.—At the present day, the power to amend executions so as to correct clerical misprisions is universally conceded, and frequently invoked. "Indeed, it is very difficult to prescribe limits to this salutary power possessed by the courts, of permitting amendments in their process, whether mesne or final. It is a power exercised for the promotion of justice, with no parsimonious hand; yet, where its allowance would be destructive of the rights of innocent third persons, the court will scan well the grounds on which its action is sought": *Cawthorn v. Knight*, 11 Ala. 582; *McCollum v. Hubbert*, 13 Ala. 284, 48 Am. Dec. 56; *Deloach v. State Bank*, 27 Ala. 444; *Meyer v. Ring*, 1 H. Black. 541; *Simon v. Gurney*, 5 Taunt. 605; *Atkinson v. Newton*, 2 Bos. & P. 336. "When we advert to the doctrine of amendments, and the cases which have been decided on that subject, it will be perceived that the object of the whole system is to provide a remedy for casual omissions, or negligence of different officers of the court; in a word, to enable the party to do that which the law and the facts in the case would have authorized or did require the officers to have done. The decisions on this subject are so numerous, and amendments so common, and I may almost say unlimited, that the difficulty is in selecting such cases as seem most directly to apply to the subject before us": *Treasurers v. Bordeaux*, 3 McCord, 144. It has been said that there is no absolute right to the amendment of a writ, and that whether leave to amend should be granted or not rests in the discretion of the court to which the application is made, and hence that its action will not be reviewed upon appeal, unless it appears to have treated the question as one of law, rather than of discretion, and to have erred in its interpretation of the law: *Hayford v. Everett*, 68 Me. 505. It is perhaps unfortunate that language of this purport should ever have been used; for where there is no question that the facts of two cases are identical, it ought not to be possible that diverse judgments should be sustained. It is of the utmost importance, both to purchasers at execution sales and to defendants whose property is exposed thereto, that persons learned in the law and conversant with the facts may determine therefrom whether leave will be granted to amend a writ apparently amendable, and this they can never do if the right to amendment is subject to the discretion of the court, if it be a discretion not controlled by settled rules of law. It is, however, settled that leave to amend will not be granted where it is not in furtherance of justice. A sale made under the writ may be for an

inadequate price, and this fact may probably be due to the imperfect character of the writ. If so, the principles of natural justice dictate the vacating of the sale rather than supporting and making it impregnable by an amendment of the writ, and the action of the court in amending the writ and refusing to quash the sale may be reviewed on appeal: *Flint v. Phipps*, 20 Or. 340, 23 Am. St. Rep. 124, 25 Pac. 725.

The theory upon which leave to amend writs is sought and granted is, that the clerk of the court has disregarded the law and the presumed command of the court by issuing a writ which does not conform to the judgment, or is defective in some other respect. The court, in directing him to amend it, but requires him to perform his original duty. It has hence been held that the power to amend applies only to writs issued by clerks of courts, or out of courts having clerks, and therefore that a justice of the peace, especially if the writ has been executed, has no power to amend it: *Porter v. Haskell*, 11 Me. 177; *Stevens v. Chouteau*, 11 Mo. 382, 49 Am. Dec. 92; *Toof v. Bentley*, 5 Wend. 276. On the other hand, it is insisted that the power is inherent in all courts having power to issue writs, including those of justices of the peace: *Silner v. Butterfield*, 2 Ind. 24. If the making of an amendment is necessarily the exercise of the judicial power, it must be restricted to judicial officers. In some of the states, however, clerks of courts are authorized by statute to amend writs in so far as to correct mistakes in issuing them: *Smith v. Bell*, 107 Ga. 800, 73 Am. St. Rep. 151, 33 S. E. 684; *Gross v. Mims*, 63 Ga. 563. So far as we know, the constitutionality of such statutes has not been questioned.

II. The Practice to be Pursued in Procuring Amendment of a Writ is not distinctly disclosed in any of the cases falling within our observation. In many instances the defects on account of which an amendment is sought are so clearly merely clerical errors, and the case is so free from doubt respecting the writ intended to be issued, that proceedings taken thereunder must be sustained, whether any formal amendment is ever made or not. In such cases the practice to be pursued in procuring an amendment cannot be material, for, conceding leave to amend to have been improvidently granted, or disregarding the amendment altogether, the rights of the plaintiff and of all persons claiming under the writ are still protected and secure. If, on the other hand, the amendment sought is of so substantial a character, or of such doubtful propriety, that the rights of the parties may be affected by it, or, instead of being a matter of course, it is a matter upon which reasonable judges may differ, certainly the parties to be affected by it should be brought before the court by some notice warning them of the proposed action and giving them an opportunity to resist it: *Bybee v. Ashby*, 2 Gilm. 151, 43 Am. Dec. 47; *Simpson v. Simpson*, 64 N. C. 427. In the absence of such notice, they should not be held bound by the order granting

leave to amend, nor by the amendment made in pursuance of it: *Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874, 12 S. W. 790. We assume, therefore, that the proper practice of a person desiring to obtain leave to amend a writ in any substantial particular, and where leave does not follow as a matter of course from a mere inspection of the record, is to give written notice to all persons apparently to be prejudiced by the amendment, that an application will be made to the court at a time stated for leave to amend the writ in a manner designated in such notice. If, however, a motion is made to quash the writ or levy, and the parties in interest are thereby brought before the court, the plaintiff or other person interested in the writ may meet this motion by a counter-motion for leave to amend and to thereby free the writ from the irregularity complained of, and this counter-motion need not be preceded by any formal written notice.

Sometimes leave to amend has been granted in a case other than that in which the writ issued, as where the objection to the writ was interposed in another action and the court engaged in the trial thereof at once ordered an amendment to be made, so as to remove the objection. The leave thus given to amend may be sustained where both actions are in the same court, and also when no harm could have resulted from the amendment for the reason that, from an inspection of the record, it is clear that the order is a correct one, for in that event the writ may be treated as amended, whether the record is in that court or not: *Dewey v. Peeler*, 161 Mass. 135, 42 Am. St. Rep. 399, 36 N. E. 800.

III. Amendments in Matters of Form.—"The form of execution most usually adopted contains the following particulars: 1. It purports to issue in the name of some sovereign power; in England, the name of the reigning monarch is used; in the United States, the name is the state of —, or the people of the state of —; 2. It is addressed to the sheriff, or to some other officer competent to execute it; 3. It commands the officer to do some act; 4. It shows the purpose for which the act is to be done, or, in other words, the judgment of which satisfaction is sought; 5. It usually directs a time and place in which and to which a return must be made; 6. It closes with a clause of attestation": *Freeman on Executions*, sec. 38.

We think that each of these parts may be amended, at any time, where the amendment proper to be made can be ascertained, either from reference to the record, or to the existing law prescribing the form and contents of the writ. Hence, if the writ issues in the name of the territory of C., instead of in the name of the state (*Carnahan v. Pell*, 4 Colo. 190), or in the case of an execution against the person of the defendant misnames the town in which the county jail is situated (*Avery v. Lewis*, 10 Vt. 332, 33 Am. Dec. 203), these are amendable defects which do not destroy the efficiency of the writ.

"While an execution should follow and conform to the judgment, it is clear that an amendment may be allowed if the execution can be so identified with the judgment and the record on which the judgment is founded that the court can find data by which to make the amendment": *Dewey v. Peeler*, 161 Mass. 135, 42 Am. St. Rep. 399, 36 N. E. 800. "The general principle is, that when the judgment is recovered in a court having jurisdiction, and the execution is issued by the proper officer, irregularities either in the mode of issuing it or in the document itself do not make it void; and that it may be dealt with by the court upon motion of either party, and amended or annulled as justice may require, and that service of it, if it is not annulled, or service restrained or suspended, is not invalid": *Cheseboro v. Barme*, 163 Mass. 79, 39 N. E. 1033.

It has been said, and perhaps truly, that a void writ cannot be amended: *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Clarke v. Miller*, 18 Barb. 269. The declaration of this general principle is of no greater aid than is that other declaration to be found in so many of the decisions, that an amendable writ is not void. We are still left without any test to determine what writs are void and what voidable. This question cannot be answered in a single sentence or section, and the reader must be left to determine it from a vast variety of decisions involving assaults upon writs and proceedings thereunder from widely divergent points of attack, attended by an infinite variety of circumstances.

IV. Amending the Direction to the Officer.—Where a writ is directed to an improper officer, but executed by the proper officer, the error in the direction does not vitiate the writ, and may be cured by amendments: *Rollins v. Rich*, 27 Me. 557; *Hearsay v. Bradbury*, 9 Mass. 95; *Wood v. Ross*, 11 Mass. 277; *Walden v. Davison*, 15 Wend. 578. Where such an error had been committed, the court said: "This is a judicial writ, and the erroneous direction is a mere misprision of our own clerk. Judicial writs are more absolutely under the control of the court than original writs. Let the amendment be made": *Campbell v. Stiles*, 9 Mass. 217. See *Atkinson v. Gatcher*, 23 Ark. 101; *Simcoke v. Frederick*, 1 Ind. 54; *Morrell v. Cook*, 31 Me. 120. Where the error is in directing the writ to the sheriff of one county, when it is intended to be delivered to the sheriff of another county, there is some doubt whether it can be amended so as to support proceedings taken in the latter county. In Illinois, it has been held that this is not a proper case for an amendment, and that, as the sheriff acted in the absence of any writ directed to him, a levy and sale made by him are incurably void: *Bybee v. Ashby*, 2 Gilm. 151, 43 Am. Dec. 47. We think, however, that an error of this character does not differ from other errors in directing a writ to an improper officer, and hence that it does not vitiate the writ, and may be cured by amendment: *Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. If the writ is required to recite some pre-existing writ

and to state the county to which it was issued, the omission to comply with such requirement is a mere irregularity which can be supplied by amendment: *Eads v. Wynne*, 79 Hun, 463, 29 N. Y. Supp. 983.

V. Amending Omission in Words of Command.—Where the law authorized executions to be levied on lands and tenements as well as on goods and chattels, a writ issued, commanding a levy on goods and chattels, but omitting the words "lands and tenements." Under this writ, lands were sold and a conveyance made in pursuance of the writ. About fifteen years afterward, this writ and deed, having been offered in evidence, were objected to for this defect, whereupon the court held as follows: "By an act of the legislature, real estate, quoad hoc, is put on the same footing with personal, and a plaintiff has the same right to have his judgment levied as well of the one as the other. An execution is the process which the law gives to enforce a judgment, and ought to pursue the law. It is a remedy which a plaintiff has a right to ask of the court, and which the court is bound to extend to him to the utmost extent of the law. The omission therefore, of the words 'lands and tenements,' etc., in the execution in the case of *Williams v. Robertson*, is clearly a clerical mistake; considering it, therefore, as the act of the court, and not of the party, I should be disposed to think, if it were necessary, that the court would—even at this day—entertain a motion to amend it, so as to render it consistent with, and make it as efficient as, the law itself": *Toomer v. Purkey*, 1 Mill Const. 323, 12 Am. Dec. 634; *Treasurers v. Bordeaux*, 3 McCord, 142.

VI. Amendments to Conform Executions to the Judgments on which they were entered have been of very frequent occurrence. By such amendments a variance in the name of the plaintiff (*Bank of Kentucky v. Lacy*, 1 T. B. Mon. 7; *Mackie v. Smith*, 4 Taunt. 322), or of the defendant (*Browne v. Hammond*, Barnes, 10; *Gross v. Mims*, 63 Ga. 563; *Vogt v. Ticknor*, 48 N. H. 242), or in the date (*Friedlander v. Fenton*, 180 Ill. 312, 72 Am. St. Rep. 207, 54 N. E. 329; *Chase v. Gilman*, 15 Me. 66; *First Nat. Bank of Hagerstown v. Weckler*, 52 Md. 30; *Woolworth v. Taylor*, 62 How. Pr. 90), or amount (*Sheppard v. Malloy*, 12 Ala. 561; *Spence v. Rutledge*, 11 Ala. 557; *Hunt v. Loucks*, 38 Cal. 376, 99 Am. Dec. 404; *Doe v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368; *McCall v. Trevor*, 4 Blackf. 496; *Hutchens v. Doe*, 3 Ind. 528; *Saunders v. Smith*, 3 Ga. 121; *Paine v. Spratley*, 5 Kan. 525; *Smith v. Keen*, 26 Me. 411; *Corthell v. Egery*, 74 Me. 41; *Robb v. Halsey*, 11 Smedes & M. 140; *Holmes v. Williams*, 3 Caines, 98; *Kokomo S. Co. v. Inman*, 21 N. Y. Supp. 705; *Hinton v. Roach*, 95 N. C. 106; *Waggoner v. Dubois*, 19 Ohio, 67; *Bachelder v. Chaves*, 5 N. Mex. 562, 25 Pac. 783; *Stevenson v. Castle*, 1 Chit. 349; *Laroche v. Washbrough*, 2 Term Rep. 737; *Black v. Wistar*, 4 Dall. 267; *King v. Harrison*, 15 East, 615; *Williams v. Waring*, 5 Tyrw. 1128, *Crompt. M. & R.* 354; *Bicknell v. Witherell*, 1 Q. B. 914), of the judgment may be corrected; or the

name of a party may be entirely stricken out when its insertion was not warranted by the judgment (*Cawthorn v. Knight*, 11 Ala. 579; *Thompson v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136; *Andress v. Roberts*, 18 Ala. 387; *Deloach v. State Bank*, 27 Ala. 457; *Goodman v. Walker*, 38 Ala. 142; *Green v. Cole*, 13 Ired. 425, 35 N. C. 425), or a name improperly omitted may be inserted: *Morse v. Dewey*, 3 N. H. 535; *Porter v. Goodman*, 1 Cow. 413; *Shaffer v. Watkins*, 7 Watts & S. 219. Hence a writ omitting the name of the plaintiff is not void, but may be perfected by inserting his name: *Smith v. Bell*, 107 Ga. 800, 78 Am. St. Rep. 151, 33 S. E. 654. So, if the judgment was against the defendant in a representative capacity, and the writ failed to state this fact, or stated it incorrectly, it may be amended to conform to the judgment. If he is described in the writ as a special administrator, it may be amended so as to describe him as administrator with the will annexed (*Dewey v. Peeler*, 161 Mass. 135, 42 Am. St. Rep. 399, 36 N. E. 800); or, if the writ is against him as administrator of the estate, it may be amended so as to be against assets of the estate which shall thereafter come into the hands of the administrator to be administered (*Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482), where such amendments will harmonize the writs with the judgments intended to be enforced by them. The style of the writ may also be amended so as to agree with the form prescribed by statute: *Hanna v. Russell*, 12 Minn. 80; *Thompson v. Bickford*, 19 Minn. 17.

VII. Amending Error in Designating the Return Day.—Where the law designates the return day, the omission to designate it in the writ is, according to the majority of the authorities, a mere clerical misprision of no serious consequence. Whether the return day be improperly designated or altogether omitted, the writ need not be quashed, but may be amended so as to make it what it should have been in the first instance: *Harrell v. Martin*, 4 Ala. 650; *Kidd v. Cromwell*, 17 Ala. 648; *Saunders v. Smith*, 3 Ga. 121; *Goode v. Miller*, 78 Ky. 235; *Harris v. West*, 25 Miss. 156; *Cramer v. Van Alstyne*, 9 Johns. 386; *Shoemaker v. Knorr*, 1 Dall. 197; *Berthon v. Keeley*, 4 Yeates, 205; *Perkins v. Woodfolk*, 8 Baxt. 480; *Furtade v. Miller*, Barnes, 213; *Reubel v. Preston*, 5 East, 291; *Walker v. Hawkey*, 1 Marsh. 399.

VIII. The Clause of Attestation may also be amended: *Haines v. McCormick*, 5 Ark. 665; *Jackson v. Bowling*, 10 Ark. 578; *Ripley v. Warren*, 2 Pick. 592; *People v. Montgomery C. P.*, 18 Wend. 633; *Newnham v. Law*, 5 Term Rep. 577; *Englehart v. Dunbar*, 2 Dowl. P. C. 202; *Rex v. Sheriff*, 1 Marsh. 344. Thus an execution tested after the defendant's death may be amended so as to bear teste of the first day of the term (*Center v. Billingham*, 1 Cow. 33; *Lane v. Beltzhoover*, Taney, 110), or, if tested out of term, may be amended so as to be tested in term time: *Jones v. Cook*, 1 Cow. 313; *Berthon v. Keeley*, 4 Yeates, 205; *Baker v. Smith*, 4 Yeates, 185;

Shoemaker v. Knorr, 1 Dall. 197; *Meyer v. Ring*, 1 H. Black. 541. So, if the court, place, or time at which the writ is to be returned is improperly stated, the writ may be amended: *Forward v. Marsh*, 18 Ala. 645; *Harrison v. Agricultural Bank*, 2 Smedes & M. 807; *Boyd v. Vanderkamp*, 1 Barb. Ch. 278; *Van Deusen v. Brower*, 6 Cow. 50; *Inman v. Griswold*, 1 Cow. 199; *Stone v. Martin*, 2 Denio, 185; *Hall v. Ayer*, 9 Abb. Pr. 220; *Atkinson v. Newton*, 2 Bos. & P. 336; *Hart v. Weston*, 5 Burr. 2588; *Hunt v. Kendrick*, 2 W. Black. 836; *Simon v. Gurney*, 5 Taunt. 605. And in case the clause of attestation be entirely omitted, it may be inserted as an amendment to the original writ: *McIntyre v. Rowan*, 8 Johns. 144. So, if the writ be attested in the name of the wrong person as chief justice, it may be amended by striking out such name and inserting the proper one: *Nash v. Brophy*, 13 Met. 476; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 841; *Brown v. Alpin*, 1 Cow. 203; *United States v. Hanford*, 19 Johns. 173; *Henry v. Henry*, 1 How. Pr. 167; *Spooner v. Frost*, 1 How. Pr. 192. It has also been held that the signature of the clerk may be added as an amendment: *Whiting v. Beebe*, 62 Ark. 421; *Taylor v. Buck*, 61 Kan. 694, 78 Am. St. Rep. 346, 60 Pac. 736. This, however, is contrary to the weight of authority, which seems to regard the signature of the clerk or other person authorized to issue the writ as indispensable to its validity. In the absence of such signature, it cannot be successfully claimed that any writ has issued to which an amendment can be applied: *Freeman on Executions*, sec. 45; *O'Donnell v. Merguire*, 131 Cal. 527, 82 Am. St. Rep. 389, 65 Pac. 847; *Short v. State*, 79 Ga. 550, 4 S. E. 852; *Rawles v. Jackson*, 104 Ga. 593, 69 Am. St. Rep. 185, 30 S. E. 820; *Hernandez v. Drake*, 81 Ill. 34; *Wooters v. Joseph*, 187 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80. An execution otherwise regular "was signed 'M. C. Haley, Clerk, by B. D. Dougherty, Deputy Clerk,' and not by C. F. Curry, who was the clerk at the date of the alleged execution. Haley was a former clerk, and his signature, 'M. C. Haley, Clerk,' was in print; and it was admitted that Dougherty was the deputy of Curry, as he had been also of Haley." The question presented was whether this execution was valid and sufficient to confer power on the sheriff to sell and convey lands. The court said: "The question, we think, admits of an obvious answer. The power of amendment, however extensive it may be, is limited to the amendment of the writs of the court, which can be authenticated only, under provisions of the law similar to ours, by the subscription of the clerk. Without this there is nothing 'which the judge can affirm' is an execution 'issued upon judgment produced.' Under the ancient practice, where the seal of the court was in the custody of a particular officer and sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution—as in fact was the case in the king's bench—though in the more modern court of common pleas the sig-

nature of the prothonotary was required. But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it. Whether both seal and subscription of the clerk—as required by the code—be essential, is a question about which the authorities differ, and which it is unnecessary, in this case, to determine. But we are of the opinion that the seal by itself is insufficient, and that the subscription of the clerk is an essential part of the writ, without which there is no execution to be amended”: *O'Donnell v. Merguire*, 131 Cal. 527, 82 Am. St. Rep. 389, 63 Pac. 847.

IX. Amending by Affixing Seal.—There are authorities of a very high character (*Weaver v. Peasley*, 163 Ill. 251, 54 Am. St. Rep. 469, 45 N. E. 119; *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906; *Frankhouser v. De Witt*, 9 Kan. App. 636, 58 Pac. 1027), affirming that the affixing of the seal of the court is essential to the validity of the original writ. Where this view is sustained, a motion to amend by affixing the seal would be unavailing, for no amendment could operate to the extent of giving life to a writ which theretofore was dead in law. But where this view is not maintained, the seal of the court, having been omitted at the issuing of the writ, may afterward be affixed as an amendment: *Bridewell v. Mooney*, 25 Ark. 524; *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84, 6 S. W. 510; *Hunter v. Burnsville T. Co.*, 56 Ind. 213; *Warmouth v. Dryden*, 125 Ind. 355, 25 N. E. 433; *Arnold v. Nye*, 23 Mich. 286; *Sawyer v. Baker*, 3 Greenl. 29; *Kipp v. Burton* (the principal case), 29 Mont. 96, ante, p. 544, 74 Pac. 85; *Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842; *Dominick v. Eacker*, 3 Barb. 17; *Purcell v. McFarland*, 1 Ired. 34, 35 Am. Dec. 734; *Clark v. Hellen*, 1 Ired. 421; *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793; *Davelaar v. Schenck*, 110 Wis. 470, 86 N. W. 185. It is scarcely necessary for us to add that, in our judgment, if there be any occasion which more than any other justifies the amendment of an execution, it is when it is in other respects in substantial conformity to the law, but the clerk has omitted to impress upon it the seal of the court. From a mere inspection of the writ and of the statute, there can be no doubt what omission has occurred and what will supply it. The writ being a judicial writ, the court should at once, on its attention being called to the matter, direct of its own motion that the clerk perform, *nunc pro tunc*, the duty so unquestionably resting upon him when he issued the writ.

X. The Time Within Which an Execution may be amended has no limit. A sale of property may have been made under execution, and for years may have been confirmed by the silent acquiescence of all the parties in interest. After time has thus elapsed, the execution may for the first time be made subject to objection for some amendable informality. In such a case, the court, irrespective of the lapse of time, will either disregard the informality

or order the execution to be amended. At all events, the mere lapse of time does not of itself interpose any obstacle to the amendment, and may even constitute an additional reason for directing it to be made. We have already shown that the power to amend is one which will be exercised in the furtherance of justice. The fact that the defendant in the writ has permitted it to be enforced without objection and that he or third persons, at a distant day, seek to avoid its effect by suggesting some error in its form or issuing is, of itself, a reason for granting, rather than of withholding, leave to amend, and certainly but few courts will reward his or their laches by denying relief: *Holmes v. Williams*, 3 Caines, 98; *Adams v. Higgins*, 23 Fla. 13, 1 South. 321; *Lewis v. Lindley*, 28 Ill. 147; *Bybee v. Ashby*, 3 Gilm. 151, 43 Am. Dec. 47; *Vogt v. Ticknor*, 48 N. H. 242; *Phelps v. Ball*, 1 Johns. Cas. 31; *Galloway v. McKeithen*, 5 Ired. 12, 42 Am. Dec. 153; *Sickler v. Overton*, 3 Pa. St. 325; *Giles v. Pratt*, 1 Hill (S. C.), 239, 26 Am. Dec. 170; *Sabin v. Austin*, 19 Wis. 421. Among these few are the courts of Texas. They make a distinction, which they nowhere clearly explain, between what they style amendments in matters of form and amendments in matter of substance; and hold, with respect to matters of substance, that amendments will not be authorized after a sale has been made under a writ. They insist that when a writ is substantially defective, any sale thereunder probably resulted in a sacrifice of the defendant's property through its realizing but an inadequate price, because prudent persons declined to compete at a sale likely or surely to be declared invalid. This result must follow decisions like those in that state, but if they had, on the other hand, sustained the right to amend writs in proper cases after sales made thereunder, the evil they seek to avoid would not have been called into being. Among the writs held in this state to be nonamendable after a sale thereunder, because of defects in matter of substance, were an execution against P. B. C. on a judgment against J. P. C. (*Battle v. Guedry*, 58 Tex. 111); against C. B. and Wm. H. on a judgment against C. B. and H. W. V. H. (*Morris v. Balkham*, 75 Tex. 111, 16 Am. St. Rep. 874, 12 S. W. 970); and an execution commanding the sale of the property of the executors named therein when the judgment authorized the sale of the property of the estate in their hands as such executors: *McKay v. Paris E. Bank*, 75 Tex. 181, 16 Am. St. Rep. 884, 12 S. W. 529.

XI. The Effect of Amending an Execution is generally to give the writ the same operation as if originally issued in due form: *Ware v. Kent*, 123 Ala. 427, 82 Am. St. Rep. 132, 26 South. 208; *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84, 6 S. W. 510; *Adams v. Higgins*, 23 Fla. 13, 1 South. 321; *Saunders v. Smith*, 3 Ga. 121; *Lewis v. Lindley*, 28 Ill. 147; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Den v. Lecony*, 1 Coxe (N. J. L.), 111; *Morse v. Dewey*, 3 N. H. 535; *Abels v. Westervelt*, 24 How. Pr. 284; *Porter v. Goodman*, 1 Cow. 413; *Jackson v. Anderson*, 4 Wend. 474; *Suydam v. McCoon*,

Coleman's Cases, 59 (*64); Phelps v. Ball, 1 Johns. Cas. 31; Cherry v. Wollard, 1 Ired. 438; Cluggage v. Duncan, 1 Serg. & R. 111; Sickler v. Overton, 3 Pa. St. 325; Treasurers v. Bordeaux, 3 McCord, 142; Toomer v. Purkey, 1 Mill Const. 323, 12 Am. Dec. 634; McCormack v. Melton, 1 Ad. & E. 331; Hunt v. Kendrick, 2 W. Black. 836; Thorpe v. Hood, 1 Dowl. P. C. 501; Mackie v. Smith, 4 Taunt. 322. Unless this were the case, the amendment would accomplish no useful purpose. If an officer is sued for not executing a writ or for negligence in its execution, it may be amended pending that action or during the trial: Hargrave v. Penrod, Breese, 401, 12 Am. Dec. 201. If a sale has taken place, the writ may be amended, and as amended may ever thereafter be offered in support of such sale: Lewis v. Lindley, 28 Ill. 147; Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275; Jackson v. Anderson, 4 Wend. 474. If the action is for false imprisonment, the defendant may have the ca. sa. under which he acted amended to conform to the judgment on which it issued, and then justify under the writ as amended: Holmes v. Williams, 3 Caines, 98. The same action may be taken and the same result accomplished where the defendant is sued for trespass in levying the writ: Porter v. Goodman, 1 Cow. 413.

In many instances the amendment of an execution may properly be described as having no effect whatsoever. When the amendment is to cure a clerical error or defect obvious from the record, or, in other words, where the record discloses the error and supplies the data for its correction, no formal amendment is necessary, and the writ will, in all collateral proceedings, be treated as amended: Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404; Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275; Corthell v. Egery, 74 Me. 41; Den v. Lecony, 1 Coxe (N. J. L.), 111; Morse v. Dewey, 3 N. H. 535; Wright v. Nostrand, 94 N. Y. 32; Sheppard v. Bland, 87 N. C. 163; Cluggage v. Duncan, 1 Serg. & R. 111; Portis v. Parker, 8 Tex. 23, 58 Am. Dec. 95; Corwith v. State Bank, 18 Wis. 560, 86 Am. Dec. 793; Griswold v. Connolly, 1 Woods, 193, Fed. Cas. No. 5833.

It is true, there are some cases treating the amendment of an execution as a matter within the discretion of the court, to be granted or refused according to its notions of justice: Hayford v. Everett, 68 Me. 505. If this view were correct, then we do not understand how a writ can be treated as amended in advance of an order authorizing its amendment, for prior to that time it cannot be known how the discretion will be exercised. But where the amendment is proper, we conceive that its allowance is not a matter of discretion. There being a valid judgment and a writ obviously issued upon it, though tainted by some mere clerical omission or defect, it is the duty of the court to give due effect to such judgment and writ and all proceedings based thereon, at least until some direct motion or proceeding is taken to quash the writ or proceedings for irregularity, and even then the better practice is to amend the writ and purge it

of the irregularity rather than to destroy it, and annul the proceedings taken for its enforcement: Freeman on Executions, sec. 78; Cheney v. Beall, 69 Ga. 533; but in this state the code provides that the amendment of an execution avoids a previous levy thereunder: Beasley v. Bowden, 58 Ga. 154; Jones v. Parker, 60 Ga. 500.

As a consequence of the general principle that void writs are not amendable, the court, in determining whether leave shall be granted to amend a writ, must consider or determine whether or not it is void. Hence, an order granting leave to amend is necessarily an adjudication that the writ is amendable and not void. Therefore, if such an order has been made and the writ has been amended in conformity therewith, all persons over whom the court had jurisdiction in making the order are bound by it, and are no longer at liberty to assert that the writ is void, and cannot sustain sales made, or other proceedings taken under it: Adams v. Higgins, 29 Fla. 13, 1 South. 321.

XII. The Effect of Not Amending an Execution is apparent from the principles stated and the authorities cited in the preceding paragraphs. If leave to amend is not sought and obtained, the plaintiff and others claiming under the writ have not the advantage resulting from the determination of the court that the writ is amendable, and may therefore sustain sales made under it. In other words, this question remains an open one. Those claiming that the writ is amendable are, however, at liberty to urge their claim in any proceeding in which it may be material, and if they satisfy the court that such is the case, the writ will usually be accorded the same effect as if it had been amended upon leave granted therefor: De Loach v. Robbins, 102 Ala. 288, 48 Am. St. Rep. 46, 14 South. 777; Adams v. Higgins, 29 Fla. 28, 1 South. 321; Anderson v. Gray, 134 Ill. 550, 23 Am. St. Rep. 696, 25 N. E. 843; Corthell v. Egery, 74 Me. 41; Den v. Lecony, 1 N. J. L. 111, 131; Sabin v. Austin, 19 Wis. 421. From this rule motions and other proceedings to quash or recall the writ must be excepted. Upon the hearing of such a motion, the court, though of the opinion that the writ is amendable, may also reach the conclusion that justice will be promoted by quashing or recalling it, and may therefore grant the motion instead of directing an amendment. It is therefore advisable in all cases where a writ is found to be infected by amendable defects to procure an order granting leave to remove them by an amendment, for by such order the plaintiff and those claiming under him are protected from the perils attendant upon a motion to quash it, and are secured the advantage of the adjudication involved in the order, to the effect that the defects in question are amendable in their character.

XIII. Persons Against Whom Amendments may be Made.—In quite a number of cases the general declaration is made that an amendment of a writ will not be ordered when it will pre-
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judice the interests of third persons: *Cape Fear Bank v. Williamson*, 2 Ired. (24 N. C.) 147; *Ohio L. I. Co. v. Urbana Ins. Co.*, 13 Ohio, 220; *Brooks v. Hodson*, 7 Man. & G. 529, 8 Scott N. B. 223; *Hunt v. Pasman*, 4 Maule & S. 329; *Phillips v. Tanner*, 6 Bing. 237, 3 Moore & P. 562; *Levett v. Kibblewhite*, 6 Taunt. 483; *Webber v. Hutchins*, 8 Meea. & W. 519; *Johnson v. Dobell*, 1 Moore & P. 28. On examining these cases, it will generally be found that the third persons against whom the court refused to authorize an amendment were not in a situation entitling them to any partiality from the court. They were, in most cases, either the assignees in bankruptcy of the defendant or his personal representatives, the assignment on the one hand and the defendant's decease on the other having taken place subsequently to the issuing of the writ sought to be amended. Neither the assignees nor representatives were purchasers for value, nor, in any respect, the holders of any special equities; and, being the mere successors of the defendant's interests, we cannot understand why they were in condition to resist anything to which his resistance, if made prior to the assignment or decease, would have been unavailing. But conceding the rule to be too well established by authority to be overthrown by argument, we conceive that it must be given a very restricted application, and must be confined to those instances where a motion to quash the writ is promptly made, and where no one but the plaintiff can be injured by refusing the amendment. There are two classes of third persons whose interests may be affected by a proposed amendment, namely, those who have derived title from the defendant, and are therefore interested in avoiding the writ; and, secondly, those who have made purchases and are derailing title by aid of the writ, and therefore interested in maintaining its validity. The latter class will no doubt be protected by amending the writ, if it be amendable. In fact, it seems, so far as their interests are involved, superfluous to order an amendment; for where an amendment is proper, it will, in collateral proceedings, be treated as if actually made: *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Cooley v. Brayton*, 16 Iowa, 10; *Williams v. Brown*, 28 Iowa, 247; *Morrell v. Cook*, 31 Me. 120; *Doe v. Gildart*, 4 How. (Miss.) 267; *Den v. Lecony*, 1 Cox (N. J. L.), 111; *Owen v. Simpson*, 3 Watts, 87; *Morse v. Dewey*, 3 N. H. 535; *Toomer v. Purkey*, 1 Mill Const. 324, 12 Am. Dec. 634; *Hubbell v. Fogartie*, 1 Hill (S. C.), 167, 26 Am. Dec. 163; *Giles v. Pratt*, 1 Hill (S. C.), 239, 26 Am. Dec. 170; *Stephens v. White*, 2 Wash. (Va.) 203; *Sabin v. Austin*, 19 Wis. 421; *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793. In determining whether an amendment should be allowed against the objection of third persons, an inquiry must be made whether such persons had any actual or constructive notice of the facts upon which the claim to the amendment is based. If, by inspecting the whole record in the case, they could have ascertained that the proposed amendment would be au-

thorized, they must be regarded as charged with constructive notice, and as holding their interest in subordination to the right of amendment: *Fairfield v. Paine*, 23 Me. 498; *Rollins v. Rich*, 27 Me. 557. "The subsequent purchaser or creditor being chargeable with constructive notice of what is contained on the record—if he has there sufficient to show him that all the requisitions of the statute have probably been complied with, and he will, notwithstanding, attempt to procure a title, under the debtor—he should stand chargeable with notice of all facts the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court. And in such cases amendments should be allowed, notwithstanding the intervening interests of such purchaser or creditor": *Whitter v. Varney*, 10 N. H. 301.

ANCIENT ORDER OF HIBERNIANS v. SPARROW.

[29 Mont. 152, 74 Pac. 197.]

STATUTES Borrowed from Other States—Construction.—Courts will not follow the construction given a statute by the court of a state from which such statute is borrowed, when such decision does not appear to be founded on right reasoning. (p. 565.)

ATTACHMENT.—A Bond Conditioned to be Void if the principal therein performs his contract is not a contract by the sureties for the "direct payment of money" within the meaning of a statute authorizing an attachment in an action upon such a contract. (pp. 567, 568.)

T. O'Leary and H. B. Whitehill, for the appellant.

G. B. Winston and Rogers & Rogers, for the respondents.

123 HOLLOWAY, J. On November 16, 1898, the Ancient Order of Hibernians, Division No. 1, of Anaconda, Montana, entered into an agreement with Edward B. White, a contractor and builder, by the terms of which White agreed to furnish the materials and erect a building for the order in Anaconda, for which he was to be paid the sum of thirteen thousand five hundred and seventy-five dollars, the building to be completed prior to December 1, 1898, and all the work to be done according to plans and specifications which were furnished. For the faithful performance of that contract White executed his indemnity bond in the sum of three thousand five hundred dollars, with respondents Sparrow, Wegner, Raderfeld and Thieffenthaler as sureties, the condition of the undertaking being that,

"if the said Edward B. White shall in all things comply with the contract in letter and spirit, and turn over to the said Ancient Order of Hibernians, Division No. 1, of Anaconda, the said building fully finished and completed in all its parts in strict compliance with the said plans and specifications, . . . then the above obligation to be void, otherwise to remain in full force and virtue."

The complaint alleges that, although White entered upon the work and performed a part of it, he abandoned the same before it was completed, and that the appellant was compelled to complete the same at a cost of more than four thousand five hundred dollars over and above the contract price of the building. The complaint then alleges that prior to the commencement of this action this appellant recovered ¹³⁴ a judgment against White for the breach of said contract in the sum of five thousand four hundred and forty dollars, and that White was soon afterward adjudged a bankrupt without assets. The prayer of the complaint is for the full amount of the bond.

At the time of the commencement of this action and the issuance of summons, upon a proper affidavit being made and the undertaking required by law being given, the clerk of the district court issued a writ of attachment under which the sheriff of Deer Lodge county levied upon property belonging to the defendants. Thereafter the defendants appeared, and moved the court to discharge the attachment upon the ground, among others, that the action is not founded upon a contract for the direct payment of money within the meaning of sections 890 and 891 of the Code of Civil Procedure. This motion was by the court sustained, and the attachment dissolved. From the order dissolving the attachment this appeal is prosecuted.

Section 890 of the Code of Civil Procedure provides as follows: "Sec. 890. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, . . . as follows: In an action upon a contract, express or implied, for the direct payment of money.

Without question this is an action upon an express contract, and the only difficulty to be met with is in the proper construction of the phrase "for the direct payment of money."

So far as we are advised, California and Oregon are the only other states having the same statutory provision. Colorado had prior to 1895. Sections 120 and 121 of the California Practice

Act. (Stats. 1851, p. 68, c. 5; Code Civ. Proc. 1897, sec. 537, 538) contain the same provisions as our section 890, above, and those sections received construction by the supreme court of California in *Hathaway v. Davis*, 33 Cal. 161, where by a divided court it was held that an ordinary appeal bond was a contract for the direct payment of money within the meaning of sections 120 and 121, above. However, the majority of the ¹³⁵ court characterized its own opinion as not being very satisfactory. This decision was made the sole ground for holding that a bail bond was likewise a contract for the direct payment of money (*City and County of San Francisco v. Brader*, 50 Cal. 506), and upon the authority of these two cases the same court, in *County of Monterey v. McKee*, 51 Cal. 255, held the official bond of the county treasurer was such a contract as is contemplated by the attachment statute.

It is contended by appellant that under the rule of construction that, where a statute is adopted from another state by this state, it is adopted with the construction given it by the highest court of that state, the decision in *Hathaway v. Davis*, 33 Cal. 161, is conclusive in this instance.

It may be true, as assumed by counsel for appellant, that our section 890 above was borrowed from California, and yet that is only an assumption, as there is nothing whatever to indicate that it is a fact. The expression "for the direct payment of money" does not appear in our attachment laws from January 15, 1869, to the adoption of the code in 1895, at which latter date at least two other states had substantially the same statutory provision as California. However, this court will not blindly follow the construction given a particular statute by the court of a state from which we borrowed it, when the decision does not appeal to us as founded on right reasoning. We understand the rule to be "that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it" (*Endlich on Interpretation of Statutes*, sec. 371; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372); or, as was said in *Stadler v. First National Bank*, 22 Mont. 203, 74 Am. St. Rep. 582, 56 Pac. 114: "When a particular statute has been adopted by this state from the statutes of another, after a judicial interpretation (suited to our condition) has been placed upon it by the parent state, the courts of this state are bound by the interpretation of the courts of the state whence it was adopted, or will ¹³⁶

at least accord respectful consideration to such interpretation, and depart from it only for strong reasons."

Prior to 1895 Colorado had an attachment statute which provided that the writ should issue upon the plaintiff making an affidavit "that the action is brought upon an overdue promissory note, bill of exchange, or other written instrument for the direct and unconditional payment of money only or upon an overdue book account": Mills' Ann. Code, sec. 92. This section received consideration in *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792, which was an action upon an appeal bond, and reference is there made to the case of *Hathaway v. Davis*, 33 Cal. 161, above, and the majority opinion disapproved. The supreme court of Colorado, after holding that such appeal bond does not come within the purview of section 92, above, says: "In this case the obligation assumed by the sureties was not direct, but collateral. They could be charged only upon the failure of the principal to pay. If he failed to pay the judgment appealed from, if affirmed by this court, then there would be a breach of the condition of the bond upon which a cause of action might be predicated."

In *People v. Boylan*, 25 Fed. 595, Hallett, J., in construing the above section of the Colorado code in an action upon an administrator's bond, says: "A direct payment is one which is absolute and unconditional as to time, amount and the persons by whom and to whom it is to be made. And a written instrument which provides for such payment is one which expresses those terms fully. It is needless to point out the difference between such an instrument and an administrator's bond." Commenting on the majority opinion in *Hathaway v. Davis*, 33 Cal. 161, Judge Hallett says: "It is to be observed, also, that in the only case cited from that state (California) in which the question was discussed, the views expressed were not altogether satisfactory to the court. And the opinion will hardly be more convincing to the profession than it was to the court."

In *Hathaway v. Davis*, 33 Cal. 161, above, Sawyer, J., dissenting, says: "The undertaking upon which a recovery is sought is 'that the ¹³⁷ appellants will pay all damages and costs which may be awarded against defendant on the appeal, not exceeding three hundred dollars.' This appears to me to be an undertaking that another party shall pay, and not that the party himself will pay. There is no promise that the defendants themselves will pay any money at all, and consequently no contract on their part for the direct payment of money. On

a failure of the appellants in the suit to pay in accordance with the terms of the undertaking, there is a breach, it is true, and the party to the undertaking is liable for damages for the breach. But the liability is strictly for damages, and not on his own contract that he himself will pay money. For these reasons I think there was no contract, express or implied, on the part of the defendant for the direct payment of money within the meaning of the attachment law, and that an attachment is unauthorized." It is to be noted that this dissenting opinion is quoted with approval in *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792.

The Code of Civil Procedure of New York (section 635) provides for the issuance of an attachment "in an action to recover a sum of money only as damages for a breach of contract, express or implied," and section 649 provides the manner of levying the writ. Construing these sections, the supreme court, in *Trepagnier & Bros. v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397, said: "But we are clear that, to be an instrument for the payment of money, it must be an instrument which acknowledges an absolute obligation to pay, not conditional or contingent; one, the execution of which being admitted, it would be incumbent on the plaintiff, in an action to enforce it, only to offer the instrument in evidence to entitle him to a recovery—in other words, an instrument that admits an existing debt. We think that this is the correct line which divides such instruments from other written contracts which contain obligations on the part of one party or the other to pay money, such as agreements of sale, hiring, leases, building contracts, etc."

One of the definitions given in Webster's Dictionary for the word "direct" is "immediate; express; unambiguous; confessed; absolute"; and it does seem that, if the term is to be ¹²⁸ given any meaning, as used in our attachment statute, it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term "direct" has no meaning whatever.

The term first appeared in our attachment statute in 1866: Act Third Leg. Assem., approved Dec. 3, 1866, p. 62, c. 12, sec. 1. These legislative enactments were annulled by act of Congress: 14 Stats. at Large, 427. Practically the same provision

was re-enacted by the fourth legislative assembly: Laws 1867, p. 156. This act was amended by act of fifth legislative session, approved January 15, 1869 (Laws 1869, p. 64), and the word "direct" omitted, and it does not reappear until 1895, when its re-enactment into our laws must be presumed to have been done for a purpose, viz., to limit the operation of the writ of attachment. Before 1895 an attachment could be had in every action upon a contract, express or implied, for the payment of money, where the debt was not secured. Since then the writ can only issue in those cases arising on contracts, express or implied, for the direct payment of money, and, applying the definitions of the term "direct" as given above, the obvious intention of the legislature can be made plain. The contracts now contemplated by section 890, above, are such only as require the payment unconditionally and absolutely of a definite sum.

As the sureties to the undertaking under consideration became liable only on condition that their principal, White, defaulted in the performance of his contract, and then only for such sum as the indemnified party might recover as damages for the breach (not exceeding the sum mentioned in the bond), we are of the opinion that the bond sued upon is not such a contract as is contemplated in section 890, above, and that the attachment was properly discharged.

The order discharging the attachment is affirmed.

If a Statute After Its Construction by the courts of the state where it originated, is adopted as a statute by another state, such construction usually will be followed in the courts of the latter: *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *Coad v. Cowhick*, 9 Wyo. 316, 87 Am. St. Rep. 953, 63 Pac. 584; *In re O'Connor*, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; *Ives v. McNicoll*, 59 Ohio St. 402, 69 Am. St. Rep. 780, 53 N. E. 60, 43 L. R. A. 772; *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689, 25 L. R. A. 608; *Laporte v. Fire Alarm Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588, 35 L. R. A. 686; *Rouse v. Donovan*, 104 Mich. 234, 53 Am. St. Rep. 457, 62 N. W. 359, 27 L. R. A. 577; *Nicollett Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577. But it will not be permitted to prevail when not in harmony with the spirit and policy of the legislation and decisions of the adopting state: *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372; *Pratt v. Miller*, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965.

A Writ of Attachment can have no force unless issued in an action on a contract express or implied: *Mudge v. Steinert*, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147. As to what is a contract within the meaning of this rule, see *Mainz v. Lederer*, 24 R. I. 23, 96 Am. St. Rep. 702, 51 Atl. 1044; *Wattles v. Wayne Circuit Judge*, 117 Mich. 662, 72 Am. St. Rep. 590, 76 N. W. 115.

PORTER v. PLYMOUTH GOLD MINING COMPANY.

[29 Mont. 347, 74 Pac. 938.]

APPELLATE PRACTICE—Notice of Appeal.—If the bill of exceptions recites service of notice of appeal upon counsel for the respondent and his acknowledgment thereof, a contention that service of such notice does not appear from the record is without merit. (p. 571.)

APPELLATE PRACTICE—Notice of Appeal.—A contention that the record does not contain the notice of appeal and judgment-roll properly certified is without merit, if the appellant has procured a new certificate from the clerk of the lower court, reciting that the record contains "full, true and correct" copies of the judgment-roll and notice of appeal, to which no objection is made. (p. 571.)

CORPORATIONS—Contract for Sale of Stock.—If a corporation contracts to sell stock and agrees that at a certain time thereafter the purchaser shall be entitled to return the stock upon the happening of a designated event, the corporation cannot claim that the sale was valid, and the contract to repurchase void, without rescinding the sale, returning the purchase money, and placing the purchaser in statu quo. (p. 573.)

CORPORATIONS—Right to Purchase Their Own Stock.—A private corporation may purchase its own stock if the transaction is fair and in good faith, free from actual or constructive fraud, provided the corporation is not insolvent, or in process of dissolution, and that the rights of its creditors are in no way affected by the purchase. (pp. 573, 574.)

CORPORATIONS—Right to Purchase Stock—Decrease of Stock.—The mere repurchase of its capital stock by a private corporation does not tend to decrease its capital stock, unless the directors absolutely merge or extinguish such stock after its repurchase. (p. 574.)

CORPORATIONS—Contract for Repurchase of Stock—Withdrawal of Subscription.—A contract by which a private corporation agrees to sell stock and to repurchase upon the happening of a certain event, is not ultra vires or void, as a secret contract between the corporation and a subscriber, by which such subscriber is at liberty to withdraw his subscription, but is valid and enforceable. (p. 575.)

CORPORATIONS—Purchase of Stock.—A purchaser of the stock of a private corporation under a contract entitling him to convey to the corporation upon the happening of a certain event, and to receive the price paid, cannot compel the corporation to repurchase the stock, without a redelivery of it to the corporation. (p. 576.)

CORPORATIONS—Option to Repurchase Stock.—If an option to repurchase corporate stock is to be exercised "at the expiration of six months from date," the seller is not bound to repurchase until the expiration of the six months, and an offer to redeliver the stock before that time is premature, and ineffective. (pp. 576, 577.)

CORPORATIONS—Repurchase of Stock.—The fact that the buyer of corporate stock is "ready and willing" to return it in accordance with a contract for its repurchase, does not constitute an offer to return such stock. (p. 577.)

APPELLATE PRACTICE—Disposal of Demurrer.—If a demurrer to a complaint has been sustained, on the ground that the complaint does not state a cause of action, the judgment entered thereon must be sustained on appeal, if the appellate court concludes that such demurrer should have been sustained on some other ground, although such ground was not suggested to the appellate court, and although the lower court may have sustained the demurrer for a wrong reason. (p. 577.)

ATTACHMENT cannot be Maintained upon a complaint which does not state facts sufficient to constitute a cause of action. (p. 578.)

S. A. Balliet, for the appellant.

Walsh & Newman, for the respondent.

³⁵³ **CLAYBERG, C.** Appeal from final judgment and from an order dissolving attachment.

The material allegations of the complaint are, briefly, as follows: That on the twenty-third day of May, 1900, appellants and respondent entered into a contract whereby respondent agreed to sell appellants four thousand shares of the capital stock of the respondent company at the price of two thousand dollars; that appellants purchased the same, and paid the consideration therefor to respondent; that at the same time this purchase was made the respondent agreed in writing with the appellants that if, the expiration of six months from the date of the sale, appellants should become dissatisfied with the stock, or with its earning power as an investment, they should be entitled to return the said stock to said respondent upon notifying respondent of their intention so to do, and that the respondent should relieve them of all liability thereon, and repay to them the said two thousand dollars, with interest at eight per cent from date of payment; that on or about September 13, 1900, appellants became dissatisfied with the stock and its earning power as an investment, and notified respondent of their conclusions, and of their intention to return the stock to respondent and demand the payment of the sum of two thousand dollars and interest. The complaint continues: "And at said date the said James Porter and George Swan did demand of said Plymouth Gold Mining Company of Gould, Montana, the payment of the said two thousand dollars, with interest, as aforesaid, and did ³⁵⁴ offer to return the stock of said Plymouth Gold Mining Company in accordance with the terms of said agreement. Plaintiffs further state that ever since said date they have been ready and willing to receive payment of said two thousand dollars (\$2,000) and interest aforesaid upon the

same from the twenty-third day of May, 1900, and ever since said thirteenth day of September, 1900, have been ready and willing to deliver said stock to said company in accordance with said agreement."

Respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court below sustained this demurrer. Appellants standing on their complaint, judgment was entered in favor of defendant.

Upon the filing of the complaint and issuance of summons in this case appellants caused an attachment to issue against the property of respondent. Respondent made a motion to dissolve the attachment, which motion was heard at the same time as the hearing of the demurrer. The court dissolve the attachment, and appellants also appeal from said order of dissolution.

On the day of the hearing of these appeals counsel for respondent presented a motion for their dismissal, based on the three following grounds, viz.: 1. Because the record does not disclose that the notice of appeal was served upon respondent; 2. Because the record does not contain the notice of appeal properly certified; 3. Because it does not appear from the certificate of the clerk of the court below that the record contains the judgment-roll. On the hearing, permission was given appellants to correct the record so as to avoid the motion to dismiss, if the facts warranted it. Counsel for the appellants procured a new certificate of the clerk of the court below, which now appears attached to the transcript, and by which the clerk certifies that the record contains "full, true and correct" copies of the judgment-roll and notice of appeal.

There is no merit in the first ground of the motion. The respondent does not object because there was no service of this notice, but because it does not appear from the record that a notice of appeal was served upon respondent. The bill of exceptions, ³⁵⁵ which is properly a part of the record, recites service upon counsel for respondent, and shows their acknowledgment of the same.

The second and third grounds of the motion, viz., that the record does not contain the notice of appeal and judgment-roll properly certified, have been removed by the new certificate of the clerk of the court below, to which no objection has been made.

We advise that the motion to dismiss the appeal be overruled. We shall therefore consider the appeal upon its merits. The first matter for consideration is the appeal from the judgment,

and the first question to be decided is, Does the complaint state facts sufficient to constitute a cause of action?

1. Counsel for respondent, in support of the judgment, insists that the contract sued upon is ultra vires on three grounds: (a) That a private corporation cannot purchase its own stock; (b) that by such purchase its capital stock is decreased, in violation of section 438 of the Civil Code; (c) that by such purchase a subscriber is secretly allowed to withdraw his subscription. We shall discuss these reasons seriatim.

(a) May a private corporation purchase its own stock? Generally speaking, a corporation, when acting within the scope of the purposes of its organization, has the same power to contract with reference to such purposes as an individual. True, this power must be exercised in the proper corporate manner, and by the proper corporate officers. In this case, however, no question is raised concerning the form or manner of the execution of the contract sued upon. So we must assume that it was made in the proper corporate manner, and by the proper corporate officers. In the absence of a showing to the contrary, we must also assume that the corporation held the stock in question for sale just as it holds any other asset, and possessed the power of disposition. We are therefore not concerned as to the manner in which the corporation acquired the stock, or the character of the stock itself. It is sufficient to know that it had the stock, ²⁵⁶ the right to sell it, sold it, and received the purchase price upon such sale.

Respondent complains that the corporation did not stop at the sale of the stock and the receipt of the purchase money, but contracted to take the stock back and return the purchase price, with interest, upon the happening of certain events. This agreement by the corporation is based upon the consideration of the purchase of and payment for the stock by appellants, by the express terms of the contract sued upon. Two objects were evidently in the minds of the contracting parties at the time this contract was entered into, which were sought to be accomplished by the contract, viz., the sale of the stock and a contract for its repurchase. The company desired to sell the stock; appellants desired to purchase the same, but were unwilling to do so without having the company bound by contract to repurchase it upon the happening of certain events. The purchase and payment of the purchase price was a consideration to the company for its promise to repurchase the stock. There was but one contract, viz., for the sale and repurchase of the stock,

each object being a consideration for the other. This contract was entire and indivisible. The sale could not be sustained unless the contract of repurchase could be enforced. Therefore, if a portion of the contract is ultra vires, the whole contract must fall. The corporation cannot be heard to say that the sale was valid and the contract to repurchase was void without rescinding the sale and returning the purchase money, thus placing the other party in statu quo ante. The appellants have executed the contract of purchase on their part by the payment of the purchase price. The corporation therefore has received from them something of value, which it would not have received except for its contract of repurchase. It cannot be heard to say: "True, I have received your two thousand dollars, which I promised to return to you upon the happening of certain events, but my promise in that regard was and is beyond my power to enter into, and, although the contemplated events have occurred, I will keep your money, and will not perform my contract." ³⁵⁷ Such action, if allowed, would be reproach upon the law. It is not honest or right, and right is the basic principle of all law.

The following language of Judge Parker in *Steam Navigation Co. v. Weed*, 17 Barb. 378, is very pertinent in this connection: "I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendants to borrow from the plaintiff one thousand dollars for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money, because you had no power, by your charter, to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the state of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted."

But this is somewhat of a digression, and is only stated as illustrating the character of the defense sought to be interposed by the corporation. We shall now return to the question under consideration.

We believe the rule to be well settled in the United States by the overwhelming weight of authority and reason that a private corporation may purchase its own stock if the transaction is fair and in good faith; if it is free from fraud, actual or constructive; if the corporation is not insolvent, or in process of dissolution; and if the rights of its creditors are in no way

affected thereby: *Clapp v. Peterson*, 104 Ill. 26; *City Bank of Columbus v. Bruce*, 17 N. Y. 507; *State v. Smith*, 48 Vt. 266; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418; *Taylor v. Miami Exp. Co.*, 6 Ohio, 177; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Chicago etc. R. R. Co. v. Marseilles*, 84 Ill. 145; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Yeaton v. Eagle Oil etc. Co.*, 4 Wash. 183, 29 Pac. 1051; *Chapman v. Ironclad etc. Co.*, 62 N. J. L. 497, 41 Atl. 690; *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; ³⁵⁸ *Howe Grain etc. Co. v. Jones*, 21 Tex. Civ. App. 198, 51 S. W. 24; *Chateaux v. Mueller*, 102 Wis. 525, 78 N. W. 1082; *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427, 45 N. W. 1037; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; *First Nat. Bank of Peoria v. Peoria Watch Co.*, 191 Ill. 128, 60 N. E. 859; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *West v. Averill Grocery Co.*, 109 Iowa, 488, 80 N. W. 555; *Dock v. Schlichter Jute Co.*, 167 Pa. St. 370, 31 Atl. 656; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; 1 Cook on Corporations, sec. 311.

No bad faith, unfairness, or fraud is charged against this transaction. There is nothing tending to show that the corporation is insolvent, or in process of dissolution, or that any creditors exist whose rights could be affected.

(b) Would the capital stock of the company have been reduced in violation of section 438 of the Civil Code by the purchase of this stock?

Section 438 of the Civil Code provides as follows: "Directors of corporations must not . . . reduce or increase the capital stock except as hereinafter specially provided." The mere repurchase of this stock would not tend to decrease the capital stock of the company, unless the directors should absolutely merge or extinguish the stock after its repurchase. The company could own and deal with it just the same as it had done before the sale. It could be sold and issued again. The company would be in no different position as to this stock than it would have been had the transaction with appellants in regard to it never occurred. When it is transferred to the company, it becomes a part of its property. It is there for the creditors and stockholders. The capital stock is not decreased. A portion of the capital of the company may be unavailable until the

stock is again sold and issued, but nothing is destroyed. Whether the stock is merged or extinguished or held as an asset for sale is much a matter of intention on the part of the corporation. ³⁵⁹ If it is unlawful to decrease the capital stock, presumptively the directors did not violate the law. It would require some positive showing to the contrary to overturn this presumption. The following authorities lend sufficient support to this position: 1 Cook on Corporations, sec. 313; Taylor v. Miami Exp. Co., 6 Ohio, 177; City Bank of Columbus v. Bruce, 17 N. Y. 507; Williams v. Savage Mfg. Co., 3 Md. Ch. 418; Ex parte Holmes, 5 Cow. 426; State v. Smith, 48 Vt. 266; Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558; Bank of San Luis Obispo v. Wickersham, 99 Cal. 655, 34 Pac. 444.

(c) Did such purchase secretly allow a subscriber to withdraw his subscription?

It must be remembered that appellants did not become subscribers for any stock of the respondent company, and therefore there could have been nothing due to the company from them as subscribers. By the transaction they became the bona fide owners of the stock as full paid, and could never be called on, at least by the company, to pay any further sum on the stock. Therefore the numerous cases relied on by the counsel for the respondent of secret contracts between a corporation and a subscriber for stock, by which the subscriber's liability for further payment on their subscription is released, while excellent law, have absolutely no bearing upon this case. The supreme court of Illinois well says with reference to these cases: "So the question is not whether appellant may release the village from paying for and receiving the shares subscribed for, but whether appellant has power to purchase shares of its own stock, paid for, issued to and held by the village": Chicago etc. Ry. Co. v. Marseilles, 84 Ill. 643. In the following cases, among others, contracts similar to the one in question were held not to be ultra vires, and were enforced against the corporations: Browne v. St. Paul Plow Works, 62 Minn. 90, 64 N. W. 66; Vent v. Duluth C. & S. Co., 64 Minn. 307, 67 N. W. 70; Freemont Carriage Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376; Chicago R. R. Co. v. Marseilles, 84 Ill. 145; Howe Grain etc. Co. v. Jones, 21 Tex. Civ. App. 198, 51 S. W. 24; New England ³⁶⁰ Tr. Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; West v. Averill Co., 109 Iowa, 488, 80 N. W. 555.

We are satisfied from the foregoing authorities that the contract was a valid and enforceable one, and that the court erred

in holding that it was ultra vires. Speaking generally, there is nothing inherently wrong about such contracts, and they have been frequently enforced as between individuals: *Schultz v. O'Rourke*, 18 Mont. 418, 45 Pac. 634; *Maurer v. King*, 127 Cal. 114, 59 Pac. 290.

2. But the complaint is fatally defective in another substantial regard. Section 1950 of the Civil Code provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event." Section 1953 provides: "Conditions concurrent are those which are mutually dependent, and are to be performed at the same time." Section 1955 provides: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section." The contract sued upon comes clearly within the provisions of these sections. The duty of redelivery of the stock to the respondent, and the payment for the same by the respondent, became concurrent, mutually dependent, and to be performed simultaneously: *Schultz v. O'Rourke*, 18 Mont. 418, 45 Pac. 634. This being true, appellants, before they can require the performance of the duty devolving upon respondent to repurchase the stock, "must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party": Civ Code, sec. 1955. The complaint is wanting in any sufficient allegation of this character. The latter part of paragraphs 2 and 3 of the complaint, above quoted, contain the only allegations which could tend in any way to this end. The latter part of paragraph 2 alleges an offer made on or about September 13, 1900, to return the stock "in accordance with the ³⁶¹ terms of said agreement." The contract was entered into on May 23, 1900. The option of resale by the appellants was to be exercised "at the expiration of six months from this date." Respondent, therefore, under the contract, was not bound to repurchase the stock until the expiration of six months from May 23, 1900, and an offer to deliver the stock to the corporation before the expiration of that time was premature, and of no avail: *Schultz v. O'Rourke*, 18 Mont. 418, 45 Pac. 634. The only other allegations in the complaint upon this matter are those found in paragraph 3. They are utterly insufficient. They do not show that the appellants were able or offered to

return the stock but only that "they are ready and willing" to do so. Being ready and willing to perform an act cannot be tortured by construction into an allegation of an offer to perform such act. One might be ready and willing to do an act without knowledge thereof on the part of the other party. The other party could only legally acquire such knowledge by an offer of performance, made to him. It is thus apparent that the complaint is deficient for want of proper allegations in this regard.

This specific defect in the complaint was not raised or argued in this court. Counsel for respondent insists only that the complaint is deficient, because it does not allege that the stock was offered to be returned properly indorsed, so as to pass title to the company upon its surrender, and not that there was no offer to deliver the stock. This position must have been taken by counsel under the erroneous assumption that the allegations of offer to return the stock on September 13th were sufficient. We have seen that they did not have that effect. This court has established the rule that, where a demurrer has been filed to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, and the court below sustains such demurrer, and plaintiff elects to stand on his complaint, and judgment is entered against him, upon an appeal from the judgment it will be affirmed if this court, upon an inspection of the complaint, concludes that the demurrer should ^{not} have been sustained upon some other ground, although such ground was not suggested or argued to this court by counsel, and although the court below may have sustained the demurrer for a wrong reason. The court says: "This case is before this court on appeal from the judgment, which judgment was on demurrer sustained to the amended complaint for want of substance, plaintiff abiding its complaint. The court was right in its decision on the demurrer. The judgment is right, and must be sustained. The court may have, in sustaining the demurrer, done so for a wrong reason, but we have nothing to do with its reasons. Our duty is to pass upon the correctness of its action. If the act of the court in sustaining the demurrer was right, the court must be sustained: Hayne on New Trial and Appeal, p. 839. The silence of counsel as to the defects found by this court in the said complaint cannot in such a case as this be regarded as a restriction upon the legal scope of the general objection raised by the demurrer": Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1.

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Counsel for appellants may say that the bill of exceptions in the record discloses the fact that the court below, in deciding the demurrer, only passed upon the question that the complaint did not state facts sufficient to constitute a cause of action, because the contract sued upon was ultra vires. There is nothing, however, in the bill of exceptions, which in any manner discloses that the point last above referred to in this opinion was not argued to or considered by the court. It may have been. The presumption that it was is just as consistent with the recital in the bill of exceptions as that it was not. We cannot, therefore, permit this recital in the bill of exceptions to prevail over the law as laid down by this court in its decisions.

3. The question as to the action of the court in dissolving the attachment which was issued at the time the suit was commenced becomes immaterial under the conclusions that we have reached upon the appeal from the judgment. If the complaint did not state facts sufficient to constitute a cause of action, no attachment could be maintained.

³⁰³ Upon the decision of this court above cited we advise that the motion to dismiss the appeal be overruled, and that the judgment and order appealed from be affirmed.

Per CURIAM. For the reasons stated in the foregoing opinion, the motion to dismiss is denied, and the judgment and order affirmed.

HOLLOWAY, J. I agree with the conclusion reached in paragraph 2 of the opinion. The only question before the court for determination is, Does the complaint state a cause of action? That question is answered in the negative in paragraph 2 above, and the judgment of the trial court is affirmed. In my judgment, the decision reached in paragraph 1 of the opinion is simply a dictum, and should not be announced as a determination of this court.

A Corporation may, under ordinary circumstances, purchase its own stock: See the monographic note to Commercial Nat. Bank v. Burch, 33 Am. St. Rep. 539-547. Compare Adams etc. Co. v. Deyette, 8 S. Dak. 119, 59 Am. St. Rep. 751, 65 N. W. 471, 31 L. R. A. 497. It cannot do so, however, to the prejudice of its creditors: Hall v. Henderson, 126 Ala. 449, 85 Am. St. Rep. 58, 28 South. 531. And it is held that a corporation cannot reduce its authorized capital by purchasing its own shares for cancellation: Cartwright v. Dickinson, 88 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. 1030, 7 L. R. A. 706.

STATE v. KEERL.

[29 Mont. 508, 75 Pac. 362.]

MURDER.—Information for Murder need not expressly allege an intent to kill. (p. 580.)

MURDER.—Information for murder must directly allege that death resulted from the mortal wound or wounds inflicted by the defendant. (p. 581.)

MURDER.—Information for murder which is defective in insufficiently alleging the cause of death is not cured by a concluding allegation that "so the said defendant did kill and murder the said deceased." (pp. 581, 582.)

MURDER—Insane Delusions.—Instructions that insane delusions, to excuse murder, must be such that if things were as the person possessed of such delusions imagined them to be they would justify the act springing from such delusions, and that one suffering from a partial delusion was in the same situation as to responsibility as if the facts with respect to which the delusion existed were real, are radically wrong, and fatally erroneous. (p. 584.)

CRIMINAL LAW—Insanity as Defense.—If a person is charged with the commission of a crime, and if at the time of its commission, by reason of disease affecting his mind, his mental faculties were so impaired or perverted, as that he was unable to distinguish between right and wrong as to the particular act with which he is charged, or if he was able to recognize that it was wrong, and yet was impelled by some impulse, originating in disease, to the commission of the act, and was unable by reason of the diseased condition of his mind, enfeebling his will, or otherwise, to refrain from its commission, he is not guilty by reason of his insanity. (p. 586.)

TRIAL.—Instructions Which are Conflicting upon a material issue are ground for the reversal of the judgment. (p. 586.)

MURDER.—Instructions in a murder case, that certain evidence is corroborative of other evidence, is a comment on the weight of the evidence, and therefore reversible error. (p. 587.)

INSANITY AS DEFENSE.—Instructions stating that lunatics and insane persons are incapable of committing crimes, and that if the defendant was an insane person he should be acquitted, are erroneous if not qualified by adding a definition of the term "insanity," because some forms of insanity are no defense to crime. (p. 588.)

INSANITY as Defense to Crime is a question of fact for the jury to determine under proper instructions. (p. 588.)

INSANITY as Defense to Crime.—An insane person in criminal law, incapable of committing a crime, is one who is so mentally unsound as to be unable to form a criminal intent to commit the particular crime charged. (p. 590.)

T. J. Walsh and C. B. Nolan, for the appellant.

J. Donovan, attorney general, for the state.

510 **CALLAWAY, C.** The defendant has appealed from a judgment finding him guilty of murder in the second degree,

and from an order denying his motion for a new trial. A number of errors are assigned.

1. He first attacks the information, which, omitting the formal parts, is as follows: "That at the county of Lewis and Clarke, in the state of Montana, on or about the eleventh day of April, A. D. 1902, and before the filing of this information, the said James S. Keerl, did, willfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought, make an assault upon one Thomas Crystal, a human being, and a certain pistol, commonly called a revolver, which was then and there loaded with gunpowder and leaden bullets, and by him. the said James S. Keerl, had and held in his right hand, he the said James S. Keerl, did then and there willfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought, shoot off and discharge at, upon and into the body of said Thomas Crystal, thereby and by thus striking the said Thomas Crystal with the said leaden bullets, inflicted upon the said Thomas Crystal certain mortal wounds in the back, side and head of the said Thomas Crystal (a more particular description of which said mortal wounds is to the county attorney unknown), of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the twenty-first day of April, A. D. 1902, at the county of Lewis and Clarke, in the state of Montana, the said Thomas Crystal died." The objections lodged against the information are: 1. It does not contain an express averment of intent to kill; 2. It fails to allege that death resulted from the wounds inflicted.

The first objection must be overruled on the authority of *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, *State v. Northrup*, 13 Mont. 522, 35 Pac. 228, and *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26. While the pleading in this respect must be held sufficient under the cases cited, this court has hitherto suggested that, as following a better practice, prosecuting officers should aver intent specially: *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26.

The second point urged presents more difficulty. After alleging the infliction of certain mortal wounds, the information continues, "of which said mortal wounds the said Thomas Crystal did then and there languish and languishing did live, and thereafter, on the twenty-first day of April, A. D. 1902, at the county of Lewis and Clarke, in the state of Montana, the said Thomas Crystal died."

An information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense: Pen. Code, sec. 1834. It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him. In order to convict an accused of murder, the fact of the killing by him as alleged must be proved beyond a reasonable doubt: Pen. Code, sec. 358. The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim, is not sufficient to substantiate a charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered: Pen. Code, sec. 357. If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of a mortal wound, death ensues from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant. This view being so clearly correct in principle, it would seem that no citation ⁵¹² of authorities is necessary, but see Clark on Criminal Procedure, 178; *People v. Lloyd*, 9 Cal. 55; *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *State v. Sundheimer*, 93 Mo. 311, 6 S. W. 52; Maxwell's Criminal Procedure, 180; Bishop's New Criminal Procedure, secs. 527, 531, 532; Wharton's Criminal Law, 10th ed., sec. 536.

In *Lutz v. Commonwealth*, 29 Pa. St. 441, while an indictment containing language similar to the one at bar was sustained, the court say: "This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading."

"The attorney general relies on the concluding clause of the information as supplying the defect, because it alleges, 'and so the said James S. Keerl did in the manner and form aforesaid willfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal.' These words are the mere conclusion drawn from the

preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires . . . the formal concluding words are immaterial": *Territory v. Young*, 5 Mont. 244, 5 Pac. 248; *State v. Northrup*, 13 Mont. 522, 35 Pac. 228.

We cannot give our approval to this information. As this case must go back for a new trial, the information may be amended by leave of the court to conform to the views herein expressed.

2. The defense interposed was that the defendant, when he committed the homicide, was affected with insanity. The defendant excepts to instructions Nos. 48, 50, 51, 52, 56 and 57, and alleges that 48, 51 and 52 are in conflict with 34, 38, 49, 53, 54 and 55. A discussion of a portion of those excepted to will be sufficient to dispose of the points raised. We quote 52, 56 and 57.

"52. The standard of accountability is this: Had the defendant, at the time of the commission of the act, sufficient mental ⁵¹³ capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of this state, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed, and is to be judged accordingly."

"56. The court further instructs you that, if you find that the accused was possessed of a delusion or delusions, you are carefully to bear in mind that it is not every delusion that can be considered an insane delusion. The delusion must be of such a character that, if things were as the person possessed of such delusion imagined them to be, they would justify the act springing from the delusion.

"57. The court further instructs you that if you find the accused was possessed of a partial delusion only, and was not in other respects insane, then he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposed another man to be in the act of attempting to take away his life, and he killed that man, as he supposed, in self-defense, he would be exempt from punishment; but if his delusion was that the deceased had done

a serious injury to his character or person, and he killed him in revenge for such supposed injury, he would be liable to punishment."

These instructions bring us to a realm in which the investigator feels himself lost in a labyrinth of conflicting decisions. Of course, any discussion of the principles applicable to insanity as a defense to a crime must necessarily be limited to the particular case in hand. As to what extent juries should be instructed upon this subject and the subject matter of such instructions is of the greatest importance. Some general rules have always been, and must be, laid down by the courts for the guidance of juries in trials of this character. This view is universally adopted; the only question is, What rule or rules should be adopted, and should the courts lay down any test? The tests of insanity generally adopted by the courts are the right and wrong test, the irresistible impulse test, the right and wrong test as regards the particular act, and the right and wrong test as modified by the irresistible impulse test. The supreme court of New Hampshire denies the existence of any test: *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

A majority of the courts seem to follow the right and wrong test laid down in *McNaghten's case*: 10 Clark & F. 200, 1 Car. & K. 47. Eng. C. L. Rep. 129, 8 Eng. Rep., Full Print, 718. For this reason, and because instructions 52, 56 and 57 are based upon the doctrines enunciated in that celebrated case, we are justified in discussing it at some length. We shall do so with special reference to instructions 56 and 57. In 1843 Daniel McNaghten was tried for the murder of Edward Drummond. At his trial medical testimony was adduced showing that McNaghten was of unsound mind at the time of the killing; that he suffered from morbid delusions; that a person so laboring under a morbid delusion might have a moral perception of right and wrong, but that in case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion. The prisoner was acquitted, but public feeling ran so high in consequence that the house of lords asked the opinion of the judges on the law governing such cases. Three of the five questions propounded were: "2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion

respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense? 3. In what terms ought the question to be left to the jury as to the prisoner's ⁵¹⁵ state of mind at the time when the act was committed? 4. If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?" To the second and third questions the judges answered "that to establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." To the fourth question they answered: "Making the same assumption as we did before, namely, that he labors under a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If this delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

Dr. Clevenger, in discussing this case, says: "Great ignorance of the nature of insanity is displayed in these answers, which seem to have been constructed with special reference to the popular wishes in the particular instance of McNaghten's offense"; and then follows with an illustrative criticism in which he demonstrates the absurdity of the abstract right and wrong test, as well as the dangerous and inhuman doctrine enunciated in that part of McNaghten's case which refers to insane delusions: Clevenger's Medical Jurisprudence of Insanity, 19 et seq.

One of the most learned discussions on this subject is by Mr. Justice Somerville, in *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 South. 854. From that opinion we quote with approval the following language: "If the rule declared ⁵¹⁶ by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be where the delusion, if real, would have

been such as to create in the mind of a reasonable man a just apprehension of imminent peril to life or limb. The personal fear or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify [excuse?] assailing his supposed adversary except an overt act or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances have justified [excused?] a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow, also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or if, in fine, he may have been so negligent as not to have declined combat when he could do so safely, without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be little less than inhuman, and its strict enforcement would probably transfer a large percentage of the inmates of our insane hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong."

We therefore think that instructions 56 and 57 are radically wrong, and should never be given.

⁵¹⁷ 3. Now, taking up 52. Defendant's counsel especially object to this instruction, because it does not recognize that the defendant may have acted under an irresistible impulse caused by mental disease.

It seems to be demonstrated by modern investigation, beyond cavil, that many insane persons, while having the mental capacity to distinguish between right and wrong, are not able to choose between doing what is right and doing what is wrong. The lower court recognized this in instructions 34, 38, 49, 53, 54 and 55. As illustrative of this, we quote a portion of 38:

"If, by reason of disease affecting his mind, his mental faculties were so impaired or perverted as that he was unable to distinguish between right and wrong as to the particular act with which he is charged; or if he was able to recognize that it was wrong, and yet was impelled by some impulse, originating in disease, to the commission of the act, and was unable by reason of the diseased condition of his mind, enfeebling his will or otherwise, to refrain from its commission—he should be acquitted by reason of insanity." This proposition was also recognized in *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169, in which the court, speaking through Mr. Chief Justice Brantly, says: "One may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control, by the overwhelming violence of mental disease, that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong."

Instruction 52 is based upon what is called the right and wrong test, which does not recognize that the accused may have been involuntarily impelled to the commission of an act from which he was mentally unable to refrain, and therefore is in conflict with instructions 34, 38, 49, 53, 54 and 55, which are based upon the right and wrong test as modified by the irresistible impulse test. In the *Peel* case the court suggested that, in a case in which there is no pretense that the party cannot control his own actions, it may be proper to apply the right and wrong test. We thus see that the lower court gave to the jury two different tests by which the defendant's responsibility for crime might be determined as the test to be followed by them. These tests are based upon different theories, and consequently upon different states of fact, and the two are irreconcilable. If instructions 34, 38, 49, 53, 54, and 55 were applicable to the facts in the case, 48, 51 and 62 could not be; the three latter excluded from the jury any consideration of the question whether, under the evidence, the defendant acted under an insane irresistible impulse. When instructions are conflicting upon a material issue, the judgment cannot stand: *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558, 59 Pac. 924.

4. Defendant also attacks instruction No. 50, on the ground that it comments upon the weight which is to be given to certain items of the testimony. So much of the instruction as is criticised reads: "That subtle essence which we call "mind" defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. For this reason evidence is admissible to show conduct and language, at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life, the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusions as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition. Evidence as to insanity ⁵¹⁹ in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore, it is that the defense has been allowed to introduce evidence to you covering the whole life of the accused and reaching to his family antecedents'"

This instruction was taken from the charge of Judge Cox to the jury in the Guiteau Case, 10 Fed. 161. In the United States courts the judges are permitted to comment upon and explain the testimony of the witnesses, but such is not the rule in this jurisdiction. The instruction is certainly open to defendant's criticism. For instance, the jury is first told that "it is never allowed to infer insanity from the mere fact of its existence in the ancestors," and is then instructed, "but, when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other." When the court told the jury that certain evidence was corroborative, it commented on the weight of that testimony. In this the court erred. It is the sole province of the jury to weigh each item of the testimony, and to give it such credit as they believe it entitled to: *State v. Sullivan*,

9 Mont. 174, 22 Pac. 1088; State v. Gleim, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294; State v. Mason, 24 Mont. 340, 61 Pac. 861.

5. While we have not passed upon the correctness of any instructions in this case which have not been argued by counsel, we call the court's attention to 32, 33 and 36. No. 32 reads: "Under the law of this state certain persons, including lunatics and insane persons, are incapable of committing crimes. Accordingly, if you find that, at the time of the doing of the acts charged in the information against the defendant, he was an insane person, it is your duty to acquit him on the ground of insanity." After the words "an insane person" the court should have explained the meaning of the term "insanity," as it is ⁵²⁰ regarded in the criminal law, either by direct definition or by reference to other parts of the charge. It is not sufficient to give the statute without explanation, because it is not every form of insanity which will excuse the defendant of the act committed.

6. The disease of insanity is subject to so many different phases, which are manifested in so many different ways—as various as human thought—that each case must stand upon its own facts. A court, therefore, cannot instruct the jury on every phase or manifestation of insanity, nor should it attempt to; the instructions should be as brief and simple as it is possible to make them. It should only declare generally upon the subject, and it must be left to the jury to find from the proof upon the issue of insanity.

The question whether the defendant in any case was affected with insanity to such a degree as will excuse him from the commission of an act which would be criminal if done by a sane person is one of fact; it certainly is not a question of law. When a defendant sets up insanity as a defense, laymen, and experts on insanity, are permitted to testify upon the question of his sanity, under the rules of evidence. Upon the testimony adduced the jury is to find the defendant guilty, or not guilty, by reason of insanity. What persons, then, are insane within the purview of the criminal law? Manifestly, those who are mentally unable to form a criminal intent. The Penal Code declares:

"Sec. 20. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.

"Sec. 21. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

For the purposes of this discussion, we shall treat insanity and lunacy as synonymous terms. What, then, is insanity in a legal sense? Mr. Bishop gives the following definition: "Insanity, ⁵²¹ in the criminal law, is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining, in the particular instance, the criminal intent which constitutes one of the elements of every crime": 1 Bishop's Criminal Law, sec. 381, subd. 2. "Criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime": State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169. In the Peel case the court did not attempt to lay down any test; it was merely discussing the case presented to it. It gave its approval to instructions 36 and 37 quoted in the opinion, saying that upon that branch of the case the lower court instructed the jury fully and fairly. It will be observed that instruction 37 dealt wholly with the question of the defendant's intent. That the instructions last mentioned were correct in the Peel case is undoubted.

It is worthy of remark that juries must be composed of men of a very high order of intelligence if they are much enlightened—indeed, if they are not badly confused—by the mass of instructions usually given them by the courts in insanity cases. Instructions are given to enlighten a jury, not to confuse it: Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

Recognizing the general doctrines asserted in the Peel case as correct, we are of the opinion that the result sought to be obtained, to wit, a solution of the question whether the defendant, when he committed the act for which he is on trial, had the mental power to entertain a criminal intent, and did entertain it, can be reached best by submitting to the jury a test founded solely upon the statute. The question for determination being, Was the defendant, when he committed the act, sane, or affected with insanity? the court should give to the jury the appropriate sections of the statute, at the same time defining insanity in accordance with Bishop's definition, as supplemented by this court's comment thereon in the Peel case, or make use of equivalent language. We doubt if any other or further instructions

on the subject of insanity are necessary or useful: *State v. 522 Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242. The jury may determine the fact from the testimony adduced before it, no matter what may be the character of the insanity attributed to the defendant. This includes, of course, insane delusions and insane irresistible impulses. To illustrate: If the defendant, when he committed the act which would be criminal if done by a sane person, did not know the difference between right and wrong, or, knowing it, was mentally unable to refrain from doing the wrong, he was incapable of forming the criminal intent; or if he was so mentally diseased that he was under the overmastering influence of a delusion which obliterated his power to refrain from the commission of the wrongful act, he was incapable of forming the criminal intent.

In a case where insanity is urged as a defense, the particular technical phase of insanity from which the defendant suffered when he committed the act (if he was in fact insane) is utterly immaterial to the jury; they do not know nor care what the alienists may call it; their desire should be, and their duty is, to ascertain whether the defendant committed the act with a criminal intent; if he did, he is guilty; if he did not, he is not guilty by reason of insanity.

For the foregoing reasons we are of the opinion that the judgment and order should be reversed, and the cause remanded for a new trial in conformity with the views herein expressed.

Per CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

HOLLOWAY, J. I am unable to agree with much that is said in the foregoing opinion. In my judgment, conflicting doctrines on the subject of insanity are announced in *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169, and, if it is intended in this instance to approve what is said in that decision upon this subject, great difficulty must necessarily be experienced upon a retrial of this cause.

In my opinion, instructions 56 and 57 are erroneous.

523 Instruction No. 50 does not state correct principles of law, and the court therein comments on the weight of the evidence. For these reasons, I think it should not be given at all.

I am also unable to reconcile the doctrine announced in *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, and *State v. Jones*, 50

N. H. 369, 9 Am. Rep. 242, which I think correct, and which seems to be approved, with what is said in other portions of the opinion of the majority of the court.

However, without attempting any discussion of the subject, I content myself with concurring in the order reversing the judgment, but do so upon the grounds that conflicting instructions upon a material issue were given, and that the court gave instructions 50, 56 and 57, above.

Insanity as a defense to crime is discussed in the monographic notes to *Knights v. State*, 76 Am. St. Rep. 83-97; *State v. Marler*, 36 Am. Dec. 402-410. And insane delusions as affecting criminal responsibility are discussed in the monographic note to *People v. Hubert*, 63 Am. St. Rep. 100-108.

CASES

IN THE

SUPREME COURT

NEBRASKA.

LEIGH v. GREEN.

[64 Neb. 533, 90 N. W. 255.]

AFFIDAVIT.—Where Statements in an Affidavit are made positively and directly, an additional statement that affiant believes them to be true does not detract therefrom. (p. 594.)

AFFIDAVIT—Information and Belief.—Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief is sufficient. (p. 595.)

TAX LIEN—Foreclosure.—A Description of the Land in a published notice in proceedings to foreclose a tax lien is sufficient where the context shows that property in the state is referred to, and there is but one tract in the state answering the description, although it is equally applicable to another tract in another state. (p. 597.)

TAXATION—Foreclosure of Tax Lien.—The Word "Owner," as used in the Nebraska statute providing for the foreclosure of tax liens where the owner is not known, refers to persons having estates in the land, and not to encumbrancers and lienholders. (p. 598.)

TAXATION.—The Owner of the Land is Unknown, within the meaning of the Nebraska statute providing for the foreclosure of tax liens, whenever the holder of a tax certificate is unable, with reasonable diligence and inquiry in the neighborhood of the land, to ascertain the whereabouts of the persons appearing to have legal estates therein, or to ascertain who have such estates. (p. 599.)

TAXATION—Affidavit.—In Proceedings to Foreclose a tax lien under a statute providing therefor when the owner of the land is not known, allegations in the petition and an affidavit for service by publication, on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack. (p. 599.)

TAXATION—Foreclosure—Parties.—In a proceeding to foreclose a tax lien under a statute providing therefor when the owner is unknown, the propriety of joining as a party defendant one having an interest in the land short of ownership will not be reviewed collaterally. (p. 599.)

TAXATION—New Title.—A sale of land in proceedings to foreclose a tax lien under a statute providing therefor when the owner is unknown, creates a new and independent title and bars all pre-existing interests or liens. (p. 600.)

TAXATION—Proceeding in Rem—Due Process of Law.—A statute awarding to the purchaser at a tax sale a remedy by suit against the land itself, available whenever the owner is not known, whereby all persons claiming interests in the land may be barred completely on sale under foreclosure, does not deny due process of law. (p. 601.)

For a statement of the facts and the statute involved in this case, see the note which follows it, post, page 603.

W. R. Green, James McCabe, Reed & Cross and Smyth & Smith, for the appellant.

C. C. McNish, Anderson & Keefe, Woolworth & McHugh, J. C. Crawford and A. R. Oleson, for the respondent.

534 POUND, C. The issues of fact and law involved in this appeal are sufficiently stated in the former opinion. Many of the conclusions reached in that opinion are acquiesced in by the parties, and have not been reargued. Four propositions, however, are insisted upon by counsel for appellee as **535** having been overlooked or wrongly determined, and require consideration. These propositions are whether an affidavit for service by publication, made upon information and belief only, is sufficient; whether the description of the land in the published notice was sufficient to give the court jurisdiction in the tax foreclosure proceedings in question; whether, under a proper construction of sections 4 and 6, article 5, chapter 77, of the Compiled Statutes, foreclosure of a tax lien by suit against the land itself will bar lienholders not made parties to the proceedings, and not served with process; and, finally, whether, if such is the proper construction of said sections, they are constitutional and valid, in view of the constitutional provisions, both federal and state, against deprivation of property without due process of law.

With respect to the first question, we may remark that it is by no means clear that the affidavit in question is to be treated as one upon information and belief. Examination of the many cases in which affidavits have been held insufficient because made upon information and belief only, discloses that in such cases the affiant stated that he believed so and so (*Armstrong v. Sanford*, 7 Minn. 49 (Gil. 34); *Thompson v. Higginbotham*, 18 Kan. 42); or that he had reason to believe and did believe

it (Clarke v. Bank, 57 Neb. 314, 73 Am. St. Rep. 507, 77 N. W. 805; Ex parte Spears, 88 Cal. 650, 22 Am. St. Rep. 341, 26 Pac. 608; Ex parte Morgan (D. C.), 20 Fed. 298); or that he was informed and believed so and so (Ex parte Rowland, 35 Tex. Cr. Rep. 108, 31 S. W. 651); or that, "on his best knowledge, information and belief," certain facts were true (Ex parte Lane (D. C.), 6 Fed. 34); or that certain statements in a pleading were true except as to statements on information and belief and that such statements were believed to be true: City of Atchison v. Bartholomew, 4 Kan. 124; Attorney General v. President etc. of Bank of Chenango, Hopk. Ch. 596. In another class of cases, more nearly like the one at bar, the affiant states that certain facts are true, as he believes, or as he is informed and believes: State v. Lancaster County Commrs., 49 Neb. 51, 68 N. W. 336; ⁵³⁶ State v. Mayor etc. of City of Lincoln, 4 Neb. 360; Clarke v. Bank, 57 Neb. 314, 73 Am. St. Rep. 507, 77 N. W. 805; Mowry v. Sanborn, 65 N. Y. 581. The case at bar differs from all of these. The statements in the affidavit are made positively, but at the end, after stating directly that the owner of the land in question is unknown, there is the further statement, "all of which I verily believe to be true." It will be seen that whereas, in the cases cited, the affiant did not make any positive statements of fact, but merely stated that he believed, or was informed and believed, that certain facts existed, in this case the statements are made positively and directly, and there is merely an additional statement that affiant believes them to be true. Does this further statement qualify or detract from what goes before? In Webster v. Daniel, 47 Ark. 131, 14 S. W. 550, the affidavit stated "that said Peter Webster has left the county of his residence to avoid service of summons, as shown by the return of the constable to the writ of summons issued herein." The court held that this was not an affidavit as to what the return showed, nor to belief based on information derived from the return, but was positive, and referred to the return as evidence only. In re Keller (D. C.), 36 Fed. 681, a complaint in extradition proceedings stated an offense positively and directly. A statement was added to the effect that the complainant verily believed the facts stated to be true. The court said: "If it is conceded that this court can construe this pleading, and reject it, still I think it is not faulty. It is a statement of a fact which the deponent, in testifying to, verily believes to be true. A man swears to what he believes to be

true, and when he states a fact under oath he says he verily believes it to be true. I do not think it is faulty on that account. I think this affidavit is sufficient." In *Pratt v. Stevens*, 94 N. Y. 387, the court said: "The addition of the words 'to deponent's best knowledge, information, and belief' does not modify or detract from the words previously employed. The general rule is that an oath taken before a competent officer merely verifies the truth of the facts stated ⁵³⁷ according to the best knowledge, information, and belief of the affiant. The positive affirmation of the facts sworn to in an affidavit is in most cases supposed and understood to be according to the best knowledge, information, and belief of the witness." The true criterion would seem to lie in the willingness of the witness to make a positive statement. If his information and knowledge are such that he will make a positive statement of the fact in question upon oath, his evidence is to be received, though the weight to be given it might be small by reason of the nature and extent of the information and knowledge from which he testifies. On the other hand, if he has a belief or opinion, but is not so completely satisfied of the fact that he will testify to it directly, but merely states his belief, then the bare statement of what he believes, but will not state positively upon his oath, is not to be received, unless the case is one where an affidavit as to his belief only is required. In the case at bar there is a direct and positive statement that the owner is unknown. The further statement that affiant believes it to be true does not detract therefrom. He not only believes it, he is willing to testify to it positively. This is much more than a mere statement of his belief. But construing the affidavit with counsel for appellee, and giving to the words with which it closes all the effect claimed for them, we agree to the conclusion reached at the former hearing, and think it sufficient. Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief ought to suffice. The statute should receive a construction in accordance with common sense. It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached. As Albert, C., said in the former opinion, with reference to the required showing that service cannot be made in the state: "In the very nature of things, upon this point at

least, the affiant, ⁵³⁸ whatever the wording of the affidavit, can never have positive knowledge. To expressly state that which, in the absence of such statement, would be necessarily implied, affects only the form, and not the substance, of the affidavit." This is no less true of the statement that the owner of the land in controversy is not known. In a trial where numerous witnesses are successively examined the several facts and circumstances may be made to appear by competent proof, and the trier of fact may draw the proper inference therefrom. But where one man is to make affidavit to the conclusion, he must in fact state the belief which the information in his possession gives rise to, whether he expressly says so or not; otherwise the required affidavit could never be made. In *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520, the court say: "In such case an affidavit upon information and belief is all that could reasonably be required. To require that such proof should be established by such evidence as would preclude all reasonable doubt, or of such character and weight as would preclude a possibility of error, would deprive this provision of the statute, in a large majority of cases, of any efficacy, and result in a failure of the remedy designed to be afforded by the law. The law itself is based upon the necessity of the case, in order to enable parties to reach and deal with property within the jurisdiction of the court." A similar observation is made in *Snell v. Meservy*, 91 Iowa, 322, 59 N. W. 32, and the great weight of authority sustains this view: See, also, *Trew v. Gaskill*, 10 Ind. 265; *Bonsell v. Bonsell*, 41 Ind. 476. We do not think the cases of *Clarke v. Bank*, 57 Neb. 314, 73 Am. St. Rep. 507, 77 N. W. 805, and *Mowry v. Sanborn*, 65 N. Y. 581, conflict in any way with the foregoing proposition. In *Clarke v. Bank*, 57 Neb. 314, 73 Am. St. Rep. 507, 77 N. W. 805, the statute required proof of certain facts to the satisfaction of the judge. These facts were capable of positive proof, directly or by circumstances. There was no requirement that the proof be by affidavit solely. The statute expressly stated ⁵³⁹ that it might be made by affidavit of the judgment creditor "or otherwise." It was the clear duty of the moving party in that case to furnish proof. If he could not do so by his own positive affidavit, he must do so by some other means. To furnish an affidavit to conclusions which proof might establish, stating them not as facts, but as matters of belief and opinion, was not enough. The distinction between such a case and the one at bar is manifest. Nor is *Mowry v. Sanborn*, 65 N. Y. 581, in point. There the affidavit was not as to nonresidence generally, but as to the

exact place where persons whose residence was known in fact resided. Such known fact was capable of positive proof.

It is next contended that the land was not made a party to the foreclosure suit, and that the court did not get jurisdiction over it, because it was insufficiently described. In the title to the petition and in the published notice, it is described as the "northwest quarter of section 27, township 31, range 3 west, sixth principal meridian," without stating in what county or state, nor whether the township in question is north or south of the base line. So far as the petition is concerned, however, the objection is clearly untenable for the reason that in the body of the pleading it is expressly stated that the land lies in Knox county, Nebraska. We think the notice sufficient also. The notice sets forth that plaintiff claims to have purchased said land for taxes at a tax sale held in Knox county, Nebraska. Thus the context shows that land in this state is referred to, not merely by the venue of the proceedings, but by the nature of plaintiff's claim. Although the description is equally applicable to another tract, situated in the state of Kansas, there is but one tract in this state to which it can possibly refer. In *Fanning v. Krapfl*, 68 Iowa, 244, 26 N. W. 133, a published notice was directed to "P. T. B. Hopkins, wife of John C. Hopkins." Said defendant's true name was "T. P. B. Hopkins." The court said: "The notice should describe the party to whom it is directed with such certainty as that neither he nor other persons acquainted ⁵⁴⁰ with or knowing him could reasonably be misled by it as to the person for whom it was intended. If the notice had come to her attention, she would have learned from it that it was intended for the wife of John C. Hopkins, which was the name of her own husband, and that it related to an interest in which W. R. I. Hopkins, who held the property now in question in trust for her, was trustee. She could hardly have failed to learn from it that she was the identical person for whom it was intended, and she could not reasonably have been misled by the transposition of the initial letters of the Christian name which occurred in it." So in this case. No one who read the notice could reasonably suppose that it referred, or might refer, to lands in Kansas. There was a tract answering the description in Knox county, Nebraska, and the notice set forth that a lien was asserted against the tract by virtue of a tax sale held in said Knox county. No one could well be misled by the omission of the word "north" under such circumstances. The same kind of

description has been passed on several times where contained in deeds, and has been upheld always when there was but one tract answering the description in the state, if the context, or circumstances indicated the state sufficiently: *Long v. Wagoner*, 47 Mo. 178; *Beal v. Blair*, 33 Iowa, 318; *Butler v. Davis*, 5 Neb. 521. It may be admitted that the question to be determined in these cases was somewhat different. But the reasons assigned seem to us to be applicable. If the whole notice makes it clear what lands are referred to, we think it is enough. This holding does not conflict with the case of *Cohen v. Trowbridge*, 6 Kan. 385. In that case a notice failing to state whether the range in which the tract attached lay was east or west of the meridian was held invalid. But there are two ranges numbered 18 in Kansas, and hence two tracts in that state were within the terms of the notice. The true rule is announced in *Fanning v. Krapfl*, 68 Iowa, 244, 26 N. W. 133. A great many titles depend upon foreclosure proceedings based on service by publication. If no reasonable ⁵⁴¹ person can be misled by a description, we ought not to imperil titles by criticising it overminutely.

Coming now to the construction of sections 4 and 6, article 5, chapter 77, of the Compiled Statutes, we are satisfied that the former opinion is in every way a correct exposition thereof, and that it should be adhered to. That the term "owner," as used in said section 4, refers to persons having estates in the land, and not to encumbrancers and lienholders, is made very plain. In what cases it may be said that the owner is "not known" within the meaning of said section is a question of some difficulty. Is it meant that the condition of the title must be such that with ordinary diligence one who investigates cannot pronounce in whom it lies? Or is it meant that the person in whom the title appears to be cannot be identified, located, or found? If the latter, to whom must he be unknown, the plaintiff or the community generally in which the land lies? Or must he be absolutely unknown? As we have in this case a collateral attack on the decree of foreclosure, it may not be necessary to go deeply into the questions to which this apparently simple phrase gives rise. We think that the owner of land is "not known," within the meaning of said section, whenever the holder of a tax certificate is unable by reasonable diligence and inquiry in the neighborhood of the land in question to ascertain the whereabouts of the person or persons appearing to have legal estates therein, or to ascertain who have

such estates. In the latter case he cannot know whom to make parties; in the former he cannot know how to serve them, since he does not know, nor can he ascertain, whether they are residents or nonresidents of the state, and if residents, where they are to be reached. Hence, when the owner of the land is not known to the holder of a tax certificate in either sense, and cannot be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings. In such case, for reasons already set forth, allegations in the petition and an affidavit for service by publication on information and belief to the effect that ⁵⁴² the owner is unknown are sufficient against collateral attack: Van Fleet on Collateral Attack, secs. 245, 247.

The plaintiff in the tax foreclosure suit joined one Root as a party defendant, alleging that he claimed some interest in the land; and we have next to consider the effect of this joinder. It has been seen that all persons having interests in the land in controversy are not for that reason "owners," within the meaning of the statute; hence Root might have had an interest by way of lien or encumbrance, and yet the allegation that the owner was unknown might have been entirely true. So long as the land was properly made a party, it was unnecessary to join parties who merely claimed interests short of ownership. They would be cut out by decree and sale without being joined, under express provisions of the statute. We do not think that the nature of the proceeding was changed in any way by joining Root. The land was properly made a party and all necessary steps to get it before the court were duly had. Whether the joinder of Root was irregular we need not decide. The important point here is that the land was sued. If the plaintiff sued another defendant also, the propriety of such course is not to be reviewed collaterally. It may be remarked, however, that parties claiming interest in the land are often joined in cases like the one under consideration in other jurisdictions, and no question appears to have been made but that the proceedings are nevertheless in rem, and bind others claiming interests in the property, who have not been joined: Pritchard v. Madren, 24 Kan. 486; Hunger v. Barlow, 39 Iowa, 539; Nash v. Church, 10 Wis. 703, 78 Am. Dec. 678.

Upon the question as to the effect of making the land a party and of sale under the decree against the land, we are entirely satisfied with the construction put upon the statute in the former opinion. The provisions of the statute are ex-

press that, "in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this section being to ⁵⁴³ create a new and independent title by virtue of the sale, entirely unconnected with all prior titles": Comp. Stats., sec. 6, art. 5, c. 77. There is every reason for construing this section to mean what it says. As remarked by Albert, C., in the former opinion, the procedure for enforcing tax liens is a part of the revenue system of the state. We cannot assent to the argument of counsel that, after the taxes have been sold to a private purchaser, the state loses all concern with the matter, and it becomes purely a case of enforcing an ordinary lien, to be governed by the ordinary principles of private law. The state must provide some means for speedy collection, if it expects to sell its taxes. If the necessities of public affairs compel the state to sell taxes in order to get in revenues quickly, they also require that every proper inducement be held out to tax purchasers in order that taxes be readily salable. The provision for foreclosure by the purchaser is much less drastic than the common method of conveying the land outright to the tax purchaser by an administrative act, without any judicial inquiry whatever. Moreover, there is nothing novel or peculiar about the proceeding. It is known to the laws of many states, and has been given the full force and effect intended by the statutes: *Pritchard v. Madren*, 24 Kan. 486; *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; *Ball v. Copper Co.*, 118 Mich. 7, 76 N. W. 130; *Freeman on Judgments*, sec. 607. We agree to the conclusion reached at the former hearing that, if the land was properly made a party, and jurisdiction over it was duly acquired by publication of notice, a sale under decree of foreclosure created a new and independent title, and barred all pre-existing interests of liens.

The statute expressly awards to the purchaser at tax sale a remedy by suit against the land itself, available whenever the owner is not known, whereby all persons claiming interests in the land may be barred completely on sale under decree of foreclosure. In so far as they give this remedy to the purchaser, are sections 4 and 6, article 5, chapter 77, of the Compiled Statutes, in conflict with provisions ⁵⁴⁴ of the state and federal constitutions against depriving persons of property without due process of law? We think not. The power of the state to levy taxes obviously carries with it the power

to collect them, and to provide all means necessary or appropriate to insure and enforce their collection. "What method shall be devised for the collection of a tax the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the state may have imposed. Very summary methods are sanctioned by practice and precedent": Cooley's Constitutional Limitations, 521. Sale and issuance of a tax deed creating a new title and cutting off liens and encumbrances (*Bagley v. Castile*, 42 Ark. 77; *Chambers v. People*, 113 Ill. 509); levy and sale by a tax collector (*Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437); issuance of a warrant by the treasurer, and levy thereunder (*Weimer v. Bunbury*, 30 Mich. 201); making taxes a paramount lien, cutting out prior claims and encumbrances (*Lydecker v. Land Co.*, 33 N. J. Eq. 415); imprisoning a delinquent collector on a writ of extent issued summarily (*In re Hackett*, 53 Vt. 354); issuance of execution by the tax collector (*State v. Allen*, 2 McCord, 56); seizure and forfeiture of the property taxed (*Henderson's Distilled spirits*, 14 Wall. 44, 20 L. ed. 815), are some of the summary modes of collection which have been upheld. Also, in *Murray v. Improvement Co.*, 18 How. 273, 15 L. ed. 372, a statute authorizing a warrant to issue against a public debtor for seizure of his property, upon an ascertainment of the amount due by administrative officers was held constitutional. As was said in *Re Hackett*, 53 Vt. 354: "Taxes are the lifeblood of government. Unless duly assessed, collected, and paid over to the proper disbursing officer, its functions are paralyzed, and disintegration and anarchy are imminent." In consequence, so long as the tax is valid, all manner of summary proceedings to collect it have always been sanctioned, the statute providing for assessment and levy being held ⁵⁴⁵ to afford due and sufficient notice. Counsel admits this, but contend that summary methods can be employed only by the state itself, acting directly. They say: "The summary method by which a party may be divested of his interest in lands without judicial proceeding can be justified only when he is withholding moneys belonging to the state. Beyond that the principle cannot go." Again: "The foreclosure of the lien of a tax certificate by judicial proceeding by a private party to realize the amount due under his lien is a judicial proceeding simply, in which the rights and powers of the sovereignty are not involved." We cannot agree. The state must have its revenues.

There is no summary administrative proceeding for collection of taxes upon land available under our statutes. Foreclosure is the sole method of enforcement. But the state cannot wait the slow process of foreclosure and sale. Selling the tax and authorizing the purchaser to collect it is a method of collection almost as old as taxation itself. Under our statute the state sells to a purchaser, and gives to him the same remedy it would have had had it chosen or been able to wait. It is obvious that purchasers might not buy unless given some sure and speedy remedy. The interests of the state and its necessities demand that great inducements be held out to tax purchasers, otherwise the state would not get in its revenues. Hence, we see no reason why a remedy which the state may employ directly to collect its revenues may not be awarded to an assignee to whom the state has been obliged to sell its claim in order to realize promptly thereon. The right of the state to exercise other powers through individuals is undoubted. In the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394, Miller, J., said: "If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would be the same as it is now. Why cannot the ⁵⁴⁶ legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing." The exercise of the right of eminent domain by corporations is an everyday occurrence, and section 39, article 2, chapter 93a, of the Compiled Statutes, allows it to private individuals in furtherance of works of irrigation. If the state could authorize the county to proceed by suit against the land in case the delinquent owner was unknown, it could equally authorize a private purchaser of the taxes to maintain such proceeding, and for the same reasons.

We should not forget, however, that the proceeding in question is not summary in the sense in which that term may be applied to the usual run of methods of collecting taxes. It is not as if the purchaser were authorized to advertise and sell the land, or to have the sheriff do so on request. He must wait the expiration of a long period of redemption. He must then bring a suit, make all proper parties if the owners are known, publish due notice upon showing by affidavit if they are

not, make proper proofs of the levy and sale and the amount due to a court in a proceeding in which every person interested may intervene, and then, after decree of foreclosure, await the due course of judicial sale and confirmation. The opportunities afforded to all persons affected to make known their claims are ample. They have no right to lie by and suffer the taxes to get many years in arrear, without exercising any diligence to protect their claims.

We recommend that the former judgment be adhered to.

Barnes and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the former judgment is adhered to.

The Principal Case was affirmed by the supreme court of the United States in *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. Rep. 390. Mr. Justice Day delivered the opinion of the court as follows:

"The facts essential to the determination of this case are briefly summarized as follows: Irwin Davis was the owner of certain lands in Knox county, Nebraska. On the twenty-fourth day of November, 1880, an action was begun by Algernon S. Patrick against Davis, in the district court of the county, and an attachment was issued and levied upon the lands. The case was afterward removed to the circuit court of the United States for the district of Nebraska, on October 18, 1882, where on January 21, 1890, an order for the sale of the lands in question was made for the satisfaction of the judgment, and the same were sold on May 15, 1894, by the United States marshal to Lionel C. Burr. Burr afterward conveyed the lands to Crawford and Peters. On June 28, 1894, Crawford and Peters conveyed the premises to Alvin L. Leigh, the plaintiff in error in the present case.

"Pending said attachment proceedings, on December 28, 1882, a deed was filed for record in the clerk's office of Knox county, purporting to convey the lands to Henry A. Root on October 8, 1880. Afterward, on May 12, 1894, a decree was rendered in the district court of Douglass county, Nebraska, in a cause wherein said Patrick was plaintiff and Davis and others were defendants, setting aside the deed from Davis to Root as fraudulent and void as against the said Patrick.

"In 1891 actions were brought in the district court of Knox county, wherein the Farmers' Loan and Trust Company was plaintiff and Henry A. Root and different subdivisions of the lands were defendants, for the foreclosure of certain tax liens, which actions, taken together, cover the lands in controversy in the present suit.

"In the same year, 1891, decrees were entered in those cases, and orders made directing the sale of the lands for the satisfaction of

the amounts found due by the decrees. In pursuance of said decrees the lands were sold by the sheriff to Henry S. Green, defendant in error in the present action. The deeds of conveyance were made and delivered to him by the sheriff. Plaintiff in error claims title because of the attachment proceedings, and defendant in error bases his claim to title upon the proceedings had for the foreclosure of the tax liens. This suit was brought by the plaintiff in error Leigh, in the district court of Knox county, to quiet title to the lands in controversy.

"In that court a decree was rendered in favor of the plaintiff in error Leigh, which decree was reversed by the supreme court of Nebraska, and the cause remanded with directions to render a decree in favor of the defendant Green.

"This writ of error is prosecuted to review the judgment of the supreme court of Nebraska.

"A motion is made to dismiss because the claim of impairment of a right secured by the fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim heretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the fourteenth amendment to the constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing: *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. Rep. 730, 45 L. ed. 1015.

"The federal question presented for our consideration is briefly this: Is the Nebraska statute under which the sale was made and under which the defendant in error claims title, in failing to make provision for service of notice of the pendency of the proceedings upon a lienholder, such as Patrick, a deprivation of property of the lienholder without due process of law within the protection of the fourteenth amendment?

"The statutes of Nebraska under which the conveyances were made to the Farmers' Loan and Trust Company are:

" 'Sec. 1. That any person, persons, or corporation having by virtue of any provisions of the tax or revenue laws of this state a lien upon any real property for taxes assessed thereon, may enforce such lien by an action in the nature of a foreclosure of a mortgage for the sale of so much real estate as may be necessary for that purpose and costs of suit.'

" 'Sec. 4. Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the dis-

strict courts, and where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a nonresident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of court for the defendant, and the action continued for publication.'

" 'Sec. 6. Deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser the same title that was vested in the defendant to the suit at time of the assessment of the tax or taxes against the same; and such deed shall be an entire bar against the defendant to such suit, and against all parties or heirs claiming under such defendants; and in case the land itself is made defendant in the suit, the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction; the object and intent of this action being to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.'

"The evident purpose of section 4, where the owner of the land is unknown, is to permit a proceeding in rem, against the land itself, with a provision for service as in case of a nonresident. By section 6 it is provided that in cases where the land itself is made defendant the deed shall be an absolute bar against all persons, unless the court proceedings are void for want of jurisdiction. The object and intent of the action is defined to be 'to create a new and independent title, by virtue of the sale, entirely unconnected with all prior titles.'

"The supreme court of Nebraska has held that the term 'owner,' as used in the fourth section, applies to the owner of the fee, and does not include a person holding a lien upon the premises. It is this section (4) and section 6 which are alleged to be in conflict with the fourteenth amendment. The argument for the appellant concedes that the state may adopt summary or even stringent measures for the collection of taxes so long as they are 'administrative' in their character; and it is admitted that such proceedings will not deprive the citizen of his property without due process of law, although had without notice of assessments or levy, or of his delinquency and the forfeiture of his lands. But the argument is, that when the state goes into court and invokes judicial power to give effect to a lien upon property, although created to secure the payment of taxes, the same principles and rules prevail which govern private citizens seeking judicial remedies, and require service on all interested parties within the jurisdiction. The right to levy and collect taxes has always been recognized as one of the supreme powers of the state, essential to its maintenance; and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen. Whether property is taken without due process of law depends upon the nature of each particular case. If it be such an ex-

ercise of power 'as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs,' it is due process of law: *Cooley's Constitutional Limitations*, 7th ed., 506.

"The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized, and not to amount to the taking of property without due process of law, as a seizure and sale of property upon warrant issued on ascertainment of the amount due by an administrative officer (*Murray v. Hoboken Land etc. Improv. Co.*, 18 How. 272, 15 L. ed. 372), the seizure and forfeiture of distilled spirits for the payment of the tax: *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. ed. 815. The subject underwent a thorough examination in the case of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, in which Mr. Justice Miller, while recognizing the difficulty of defining satisfactorily due process of law in terms which shall apply to all cases, and the desirability of judicial determination upon each case as it arises, used this language: 'That whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some limited portion of the community; and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case—the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'

"In the present case, the argument is that as the state has not seen fit to resort to the drastic remedy of summary sale of the land for delinquent taxes, but has created a lien in favor of a purchaser, at tax sale, after permitting two years to elapse in which the owner or lienholder may redeem the property, it has, in authorizing a foreclosure without actual service, taken property without due process of law, because the proceedings and sale to satisfy the tax lien do not require all lienholders within the jurisdiction of the court to be served with process. If the state may proceed summarily, we see no reason why it may not resort to such judicial proceedings as are authorized in this case. And if the state may do so, is the property owner injured by a transfer of such rights to the purchaser at the tax sale, who is invested with the authority of the state? In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the objection was made that the state could not delegate its power to a private corporation to do certain public work, and by statute fix the price at which the work should be done. In that connection, speaking of the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. ed. 394, Mr. Justice Miller said: 'The right of the state to use a private corporation and confer upon

it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us.'

'In the statute under consideration, for the purpose of collecting the public revenue, the state has provided for the enforcement of a lien by the purchaser at a tax sale, and authorized him to proceed against the land subject to the tax, to enforce the right conferred by the state. The state has a right to adopt its own method of collecting its taxes, which can only be interfered with by federal authority when necessary for the protection of rights guaranteed by the federal constitution. In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the state is in exercise of its sovereign power to raise revenues essential to carry on the affairs of state and the due administration of the laws. This fact should not be overlooked in determining the nature and extent of the powers to be exercised. 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them': *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. ed. 892, 896, 10 Sup. Ct. Rep. 533, 535.

'In authorizing the proceedings under the statute to enforce the lien of the purchaser, who has furnished the state its revenue in reliance upon the remedy given against the land assessed, the state is as much in the exercise of its sovereign power to collect the public revenues as it is in a direct proceeding to distrain property or subject it to sale in summary proceedings.

'Nor is the remedy given in derogation of individual rights, as long recognized in proceedings in rem, when the fourteenth amendment was adopted. The statute undertakes to proceed in rem, by making the land, as such, answer for the public dues. Of course, merely giving a name to an action as concerning the thing rather than personal rights in it cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. But it is to be remembered that the primary object of the statute is to reach the land which has been assessed. Of such proceedings, it is said in *Cooley on Taxation*, second edition, 527: 'Proceedings of this nature are not usually proceedings against parties; nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that

form.' And see *Winona etc. Land Co. v. Minnesota*, 159 U. S. 537, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

"Such being the character of the proceedings, and those interested having an opportunity to be heard upon application, the notice was in such form as was reasonably calculated to bring the same to the attention of those interested in the lands.

"This notice was to all persons interested in the property. The lienholder, the Nebraska court has held, may appear in court and set up his claim. The notice was good as against the world, and all that is necessary when the proceedings are in rem. 'Laws exist under which property is responsible for damages done by it, for taxes imposed upon it. . . . These same laws often authorize the obligation by them imposed upon the property to be enforced by proceedings in which the property is the defendant and in which no service of process is required except upon such property. The judgment resulting from such a proceeding is in rem, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon the property, and, in so acting, necessarily affects all claimants thereto': *Freeman on Judgments*, sec. 606.

"When the proceedings are in personam the object is to bind the rights of persons, and in such cases the person must be served with process; in proceeding to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment: *Cross v. Armstrong*, 44 Ohio St. 613, 624, 10 N. E. 160. Where land is sought to be sold, and is described in the notice, a technical service upon it would add nothing to the procedure where the owner is unknown. The publication of notice which describes the land is certainly the equal in publicity of any seizure which can be made of it.

"In *Tyler v. Registration Court Judges*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the supreme judicial court of Massachusetts upheld as constitutional an act providing for registering and confirming titles to lands, in which the original registration deprived all persons, except the registered owner, of any interest in the land, and the act gave judicial powers to the recorder after the original registration although not a judicial officer, and there was no provision for notice before registration of transfer or dealings subsequent to the original registration. The majority opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts. In the course of the opinion, speaking of the Massachusetts Bill of Rights and the fourteenth amendment, he said: 'Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding in rem, dealing with a tangible res, may be instituted and carried to judgment without personal service upon claimants within the state or notice by name to those outside of it, and not encounter any provision of either constitution. Jurisdiction is secured by the power of the court over the res.'

"In *Huling v. Kaw Valley R. etc. Co.*, 130 U. S. 559, 9 Sup. Ct. Rep. 603, 32 L. ed. 1045, it was held that notice by publication in proceedings to condemn land for railway purposes was sufficient notice to nonresident owners, and was due process of law as to such owners. So as to adjudications of titles of real estate within the limits of the state as against nonresident owners, brought in by publication only: *Arndt v. Griggs*, 134 U. S. 316-327, 10 Sup. Ct. Rep. 557, 33 L. ed. 918-922; *Hamilton v. Lewis*, 161 U. S. 256-274, 16 Sup. Ct. Rep. 585, 40 L. ed. 691-699.

"The principles applicable which may be deduced from the authorities we think lead to this result: Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the fourteenth amendment to the constitution.

"In the case under consideration the notice was sufficiently clear as to the lands to be sold; the lienholders investigating the title could readily have seen in the public records that the taxes were unpaid and a lien outstanding, which, after two years, might be foreclosed and the lands sold and, by the laws of the state, an indefeasible title given to the purchaser. Such lienholder had the right for two years to redeem, or, had he appeared in the foreclosure case, to set up his rights in the land. These proceedings arise in aid of the right and power of the state to collect the public revenue, and did not, in our opinion, abridge the right of the lienholder to the protection guaranteed by the constitution against the taking of property without due process of law.

"The judgment of the supreme court of Nebraska is affirmed."

The Constitutionality of statutes providing for proceedings against unknown owners is discussed in the monographic note to *McClymond v. Noble*, 87 Am. St. Rep. 358-368. A statute declaring that upon the nonpayment of taxes land shall be forfeited to the state without judicial proceedings is unconstitutional as depriving the owner of property without due process of law: *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718, and see the cases cited in the cross-reference note thereto.

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COUNTY OF HARLAN v. WHITNEY.

[65 Neb. 105, 90 N. W. 993.]

SURETYSHIP—Security for Indemnity.—A Creditor is entitled to enforce for his own benefit any securities which the principal debtor has given his surety by way of indemnity. (p. 611.)

SURETYSHIP—Right of Obligor to Assigned Securities.—If sureties on the bond of a county treasurer assign to the county securities given them by the principal by way of indemnity, the county may enforce them, although the sureties might not have done so without first discharging the obligation. (p. 611.)

MORTGAGE—Consideration.—The Contingent Liability of a principal to his sureties is sufficient consideration for a mortgage given to indemnify them after the execution and delivery of the bond, and before any breach. (p. 611.)

MORTGAGE—Parol Evidence to Explain.—If a deed recites that the grantee is trustee for the sureties on the bond of the grantor, parol evidence is admissible to identify the sureties and the obligation referred to. (p. 612.)

MORTGAGE to Indemnify Sureties—Validity.—A mortgage given by a county treasurer to indemnify the sureties on his bond is not void because at the time of its execution he was suspected of embezzlement, and it was given to protect them against consequent liability. (p. 612.)

SURETYSHIP—Subrogation.—A County, after default in the conditions of the bond of its treasurer, may take advantage of securities given by him to his sureties, either by way of subrogation or by procuring an assignment from the sureties. (p. 613.)

DEED FOR SECURITY—Liability not Limited by Consideration Recited.—The security of a deed, in form absolute, given to indemnify sureties, is not limited to the nominal money consideration recited, but extends to the full amount for which the sureties ultimately prove liable. (p. 613.)

John Everson, for the appellants.

A. M. Beresford, for the respondents.

106 POUND, C. Ezra S. Whitney, as treasurer of the county of Harlan, had given the required bond, with several sureties, for due performance of the duties of his office. Toward the end of his term a suspicion arose that he was short in his accounts. Thereupon, in order to indemnify said sureties, he and his wife executed deed conveying the lands in controversy to one Roberts as trustee, reciting expressly that he was trustee for the sureties on said Whitney's official bond. A shortage having occurred as anticipated, the successor of the trustee conveyed said property to the county, which brought this suit, alleging that the deed was intended as a mortgage

to secure said sureties and the county against loss, and praying foreclosure. A decree was rendered accordingly, from which this appeal has been taken.

It is argued that there is no evidence to sustain the decree because the proof shows clearly that said conveyance was intended to secure the sureties only, and there is no evidence in support of the allegation that it was intended for security of the county as well, nor is it shown that the sureties have paid the amount due on the bond. But it is elementary that a creditor is entitled to enforce for his own benefit any securities which the principal debtor has given his surety by way of indemnity. In equity, such securities are considered as held by the surety ¹⁰⁷ in trust for payment of the principal obligation. In a sense they belong to the creditor, and proof that they were given to indemnify the surety would be sufficient to support the allegation that they were given for further security of the creditor, if such an allegation were necessary: *Blair State Bank v. Stewart*, 57 Neb. 58, 63, 77 N. W. 370; *Longfellow v. Barnard*, 58 Neb. 612, 617, 76 Am. St. Rep. 117, 79 N. W. 255. In the latter case it was held that "a mortgage given to indemnify a surety or guarantor is in legal effect a security to the owner of the debt, even though he did not originally rely on it or know of its existence." It follows that when the sureties, through their trustee, assigned the security to the county by conveyance of the land, the county could enforce it, although the sureties might not have done so themselves without first discharging the obligation. The security is regarded as given for discharge of that obligation, and must be applied thereon, either directly, or by satisfying those who have discharged it. Equity does not insist upon the circuitous procedure of payment by the sureties and enforcement by them. It looks to the substance, and will permit or even require an application upon the debt directly at suit of the creditor: *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539.

Several points have been urged against the validity of the deed, which require brief notice.

It is said that there was no consideration, since the deed was made long after execution and delivery of the bond and before any breach. But it is clear that the contingent liability of the principal to his sureties was sufficient consideration for a mortgage: *Longfellow v. Barnard*, 58 Neb. 612, 618, 76 Am. St. Rep. 117, 79 N. W. 255, and cases cited. The authorities relied upon by counsel have reference only to promises and con-

tracts for indemnity, which are obviously governed by a different rule.

It is claimed, further, that the deed is void for uncertainty, for the reason that it does not sufficiently designate or describe the beneficiaries. The deed recites expressly that the property is conveyed to the grantee "as trustee ¹⁰⁸ for the sureties on the official bond of the said Ezra S. Whitney." It was certainly competent to show by extrinsic evidence that Whitney was county treasurer, that he had given an official bond as such, and that his intention in executing and delivering the deed was to secure the sureties thereon. Counsel argues that it appears Whitney held the office for two terms, and gave two bonds, and that there is nothing to show which bond was referred to. But the obvious purpose is to secure those sureties who stood in need of indemnity, and the evidence introduced by plaintiff shows that such was the grantor's intent. Parol evidence was admissible to show who were the sureties referred to as beneficiaries (*Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905; *Lee v. Methodist Episcopal Church of Ft. Edward*, 52 Barb. (N. Y.) 116; *Cole v. Satsop Ry. Co.*, 9 Wash. 487, 43 Am. St. Rep. 858, 37 Pac. 700; *Bartlett v. Remington*, 59 N. H. 364; *Bayles v. Crossman*, 5 Ohio Dec. 354), and also to identify the debt or obligation intended to be secured: *Jones v. New York Guaranty etc. Co.*, 101 U. S. 622, 25 L. ed. 1030; *Clark v. Houghton*, 12 Gray (Mass.), 38; *Douglas v. Town of Chatham*, 41 Conn. 211; *Cutler v. Steele*, 93 Mich. 204, 53 N. W. 521; *Paine v. Benton*, 32 Wis. 491.

Next it is argued that the deed is void because at the time it was made the grantor was suspected of having embezzled public funds, and the parties contemplated embezzlement or defalcation, and sought to protect themselves against the consequent liability. But the deed was not intended to permit Whitney to embezzle, or to protect him in so doing. The sureties did not agree to save their principal harmless in case he embezzled public funds. They were indemnified, not he. He gave them security against liability upon the bond which they had signed to permit him to enter upon his office. The purpose was to insure that the county get the moneys due it, not that its moneys should be abstracted with impunity.

Finally, it is said that a county may not demand of a county treasurer any other or further security than the ¹⁰⁹ bond required by law. Granting this proposition, we are unable to see any reason why, after default in the conditions of such bond,

the county may not take advantage of securities given by the treasurer to the sureties thereon, whether by way of suit for subrogation or by procuring an assignment from the sureties, as any other creditor might do.

Counsel complains of the decree rendered for two further reasons: That the liability of the land mortgaged was not limited to the consideration recited in the deed, and that there was no sufficient proof that proceedings at law had not been taken to collect the amount due. Neither point is well taken. The recital of a comparatively trivial money consideration is obviously a mere form. The deed states and the evidence shows that it was given to indemnify the sureties. It was not intended to indemnify them to the extent of one thousand dollars only, but for the full amount for which they might ultimately prove to be liable, which was over eleven thousand dollars. There is nothing on the face of the deed or in the evidence to indicate an intention to limit its security to the sum recited as consideration, and the recital, of itself, being clearly formal, could not have that effect. The petition contains the required allegation that no proceedings have been had at law. It appears in evidence that the sureties turned their security over to the county in settlement of the balance for which they were liable on the bond. After doing so they could not sue Whitney for anything secured by the deed, because, so far as they were concerned, the deed had already settled the liability it secured. The county could not sue at law on the bond, because it had taken the security in settlement thereof. In the absence of any evidence to the contrary, a prima facie showing is enough: *President etc. Ins. Co. of North America v. Parker*, 64 Neb. 411, 89 N. W. 1040.

The decree is sustained by the evidence and is in accordance with law. We recommend that it be affirmed.

Barnes and Oldham, CC., concur.

110 By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Creditor, in case of the default of his debtor, may avail himself of securities given by the debtor to his surety to indemnify the latter against liability for the debt. This is the corollary of the doctrine that a surety is entitled to the benefit of any security the creditor may have taken from the principal: See the monographic note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 509, 510, on the right to subrogation.

TESKE v. DITTBERNER.

[65 Neb. 167, 91 N. W. 188.]

WILL, WHAT IS—Conveyance in Consideration of Support.
An oral agreement between a son and his parents that he shall, in consideration of carrying on their business and providing for their support, become vested, upon their death, with the title to the family homestead, is testamentary in character. (p. 615.)

WILL, WHAT IS.—The Sole Test by Which to Ascertain
whether an instrument or agreement purporting to affect the title to land is testamentary, is to inquire whether it undertakes to vest any present interest to title therein. (p. 615.)

HOMESTEAD—Oral Transfer in Consideration of Support.—
An oral agreement between a son and his parents that he shall, in consideration of carrying on their business and providing for their support, become vested, upon their death, with the title to the family homestead, contravenes the statute of frauds and the statute of wills; but, if fairly made and substantially performed by the son, equity may grant him relief in case the parents repudiate the agreement. (p. 618.)

It appears from the former decision of this case in 63 Neb. 607, 88 N. W. 658, that the parents of Carl Teske entered into an agreement with him that he should, in consideration of carrying on their business and providing for their support, become vested, upon their death, with the title to the family homestead. He performed this agreement up to the time of his mother's death, and for some time thereafter, when the father left the homestead, took up his residence with his daughter, Martha Dittberner, and conveyed the property to her.

William B. Allen and Willis E. Reed, for the appellants.

McKillip & McAllister and Reeder & Hobart, for the respondent.

168 AMES, C. This case comes before us upon a rehearing granted from a former decision of this court published in Teske v. Dittberner, 63 Neb. 607, 88 N. W. 658. Reference is made to that opinion for a sufficient statement of the facts involved in the litigation. Upon the reargument considerations and authorities were urged upon us which, on account of the hurried and insufficient manner in which the cause was presented on the former hearing, escaped our attention at that time, and which have convinced us that we fell into grievous error in the disposition which we made of the case. We at that time labored under the impression that, inasmuch as the prem-

ises sought to be recovered were admittedly the homestead of the defendant Frederick Teske, and the agreement in controversy was confessedly not in writing, the plaintiff was precluded from obtaining the relief prayed by section 4 of chapter 36 of the Compiled Statutes, which enacts that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." By section 1 of the act a homestead is defined as consisting of the dwelling-house in which the claimant resides and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres in all to the value of not exceeding two thousand dollars. By the seventeenth section it is enacted that when the claimants are married persons, the person from whose property the homestead was selected may dispose of it by will, subject to a life estate of the survivor therein. The right, therefore, of Frederick Teske to make a testamentary disposition ¹⁶⁹ of the property in question, subject to the inchoate life estate therein of his wife (now deceased), is expressly preserved to him by the statute. It is quite likely that he should not have been held to have been deprived of that right in the absence of the express words of the act: *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420; *Gee v. Moore*, 14 Cal. 472; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609.

It cannot, we think, be successfully contended that the agreement which the referee has found to have been made between Carl Teske and his parents was not testamentary in its character, nor can it well be disputed that he has fully performed and offered to perform on his part. The decision of the question does not depend upon the choice of any particular words or the use of any special form of expression, but "the doctrine of the cases is that whatever the form of the instrument, if it vests no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument": *Turner v. Scott*, 51 Pa. St. 126; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Sutton v. Hayden*, 62 Mo. 101. These cases establish the doctrine that the sole test by which to ascertain whether an instrument or agreement purporting to affect the title to land is testamentary, is to inquire whether it undertakes to vest any present interest or title therein. If it does not, but the title is to remain unaffected until the death

of the owner, and an interest is then to accrue to the other party to the agreement, the contract is testamentary, and in ordinary cases revocable.

The only remaining questions are whether an oral agreement to make a testamentary disposition of real estate, made in consideration of services substantially performed, such as were rendered by the appellee, Carl Teske, will be enforced by the court, and, if so, what, under circumstances like those in the case at bar, should be the form of the relief granted. The former of these questions seems to have been definitely answered in the affirmative by this court in *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 635, 59 N. W. 788, 25 L. R. A. 207. See, also, *Svenburg* ¹⁷⁰ v. *Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427. In the opinions in these two cases a large number of previous decisions to the same effect are collated, which apparently fortify the doctrine beyond the possibility of successful assault. In all these cases it is held that part performance takes the transaction out of the operation of the statute of frauds, and that when, as in this case, such performance is of such nature as that it cannot be measured or adequately compensated in damages, equity will interfere for the purpose of protecting the rights of the party injured. In *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450, the relief sought seems to have been denied for the sole reason that in the opinion of the court the services rendered in that case were not of such a nature that they could not be adequately recompensed by the ordinary legal procedure. We do not think that the circumstances of this case bring it within the exception.

It does not seem to be an obstacle to the granting of relief in such cases as this that the testator, if he may properly be so called, who has conveyed away his property in violation of his agreement, is still living. Specific performance, strictly so called, cannot be decreed because the father is still living, and until his death the right of the son to have the title vested in himself will not have accrued. But such a situation has already been considered by the courts, and the difficulty thence arising has been solved to our satisfaction. In *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, followed and affirmed in *Davison v. Davison*, 13 N. J. Eq. 246, approved in *Gupton v. Gupton*, 47 Mo. 37, and in *Sutton v. Hayden*, 62 Mo. 101, it was held that in instances of this kind the grantees, with notice and in fraud of the testamentary agreement, will be decreed to hold

the title in trust until the happening of the event vesting a present right thereto in the complainant, and will then be required to convey it to the latter. The conclusion thus arrived at is in contravention of the letter both of the statute of frauds and of the statute of wills; and beyond doubt transactions of the kind in question should be closely scrutinized, or else they may open the door to the ¹⁷¹ exercise of the grossest kind of undue influence and to frauds and abuses of the most serious descriptions; but the rules of equity applicable to them, when free from any of these objections, are well established by a large number of decisions, many of which have received the express approval of this court. There is nothing in the record to indicate that the appellee, Carl Teske, has been guilty of any objectionable practices, and it is beyond question that he has spent many of the best years of his life in the performance in good faith of the testamentary agreement, which the referee has found upon sufficient evidence to have been entered into between himself and his parents. It does not appear to us that for a repudiation of the agreement by his father he could be adequately compensated in damages. The father is very old and feeble, both in mind and body, so that it is not unlikely that his conveyance to his daughter, if not unduly influenced, was made in response to some temporary whim or resentment. That it was not the result of any fixed determination on his part is indicated by the fact that he has dismissed his appeal in this court, and manifested a desire that the judgment of the district court be affirmed. At or before the conveyance to the appellant, Martha Dittberner, she parted with no consideration on account thereof, and she had full knowledge of the claims of her brother, who was in occupancy of the premises. There is therefore no fact or circumstance disclosed by the record to raise in equity in her behalf. If at the death of her father she shall be entitled to compensation for his care and support during the term of his residence with her, she may demand the same from his estate, which will apparently be considerable in amount. In any case, the old gentleman is entitled to comfortable care and subsistence out of his estate or the avails of it, nor is he bound to reside with his son, if he desires to abide elsewhere, and it is not likely that even the testamentary agreement might, under conceivable circumstances, be required to yield so far as may be requisite for ministering to his necessities. But whether this be so or not, it is the ¹⁷² clear duty of the court to protect the rights of the son by maintaining

the present status, so far as possible, during the remainder of the old man's life.

It is recommended that the former decision of this court be overruled and set aside; and that the judgment of the district court be so modified that the appellee, Carl Teske, be decreed to be entitled upon giving a bond such as is tendered in his petition, if one has not already been given, to retain the occupancy of the premises in controversy during the lifetime of his father, Frederick Teske, subject to the terms, conditions and stipulations of the testamentary agreement set forth in the report of the referee in this action; and that until the death of said Frederick Teske the appellant, Martha Dittberner, be adjudged to hold the legal title to said premises in trust, for the satisfaction of the terms and conditions of said agreement, free from any estate or interest of her husband, the appellant, Frederick Dittberner, as tenant by the curtesy or otherwise; and that she be perpetually restrained and enjoined from conveying or encumbering the same except as herein directed; and that upon the death of said Frederick Teske, and full compliance with and performance of said agreement by said Carl Teske, a conveyance of said premises to him be made by said Martha Dittberner; and that the said decree, when so modified, be affirmed.

Duffie, C., concurs.

Albert, C., not present at the hearing and took no part in the decision.

By the COURT. For the reasons stated in the foregoing opinion it is ordered that the former decision of this court be overruled and set aside; and that the judgment of the district court be so modified that the appellee, Carl Teske, be decreed to be entitled upon giving a bond such as is tendered in his petition, if one has not already been given, to retain the occupancy of the premises in controversy during the lifetime of his father, Frederick Teske, subject to the terms, conditions and stipulations of the testamentary agreement set forth in the report of the referee ¹⁷³ in this action; and that until the death of said Frederick Teske the appellant, Martha Dittberner, be adjudged to hold the legal title to said premises in trust, for the satisfaction of the terms and conditions of said agreement, free from any estate or interest of her husband, the appellant, Frederick Dittberner, as tenant by the curtesy or otherwise;

and that she be perpetually restrained and enjoined from conveying or encumbering the same, except as herein directed; and that upon the death of said Frederick Teske, and full compliance with and performance of said agreement by Carl Teske, a conveyance of said premises to him be made by said Martha Dittberner; and that the said decree, so modified, be affirmed.

Judgment accordingly.

What Constitutes a Testamentary Writing is the subject of a monographic note to *Farris v. Neville*, 89 Am. St. Rep. 486-500. A reference to this note will show that the form of any instrument is of little consequence in determining whether it is a will; if it is executed with the formalities prescribed by statute, and is to operate only after the death of the maker, it is a will: See, also, *McCloskey v. Tierney*, 141 Cal. 101, 99 Am. St. Rep. 33, 74 Pac. 699.

The Effect of Oral Agreements testamentary in character are considered in *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 22 N. E. 277, 44 N. E. 17, 32 L. R. A. 298; *Moran v. Moran*, 104 Iowa, 216, 65 Am. St. Rep. 443, 73 N. W. 617, 39 L. R. A. 204; *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 8; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572; *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134. And the right to recover for services rendered under an oral contract to make a will is considered in *Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15; *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, 42 N. W. 252, 4 L. R. A. 55; *Estate of Kessler*, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129. A parol gift or conveyance of land will, under some circumstances, support a decree for specific performance: *Cauble v. Worsham*, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871, and cases cited in the cross-reference note thereto; *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 251.

CONSTERDINE v. MOORE.

[65 Neb. 291, 96 N. W. 1021.]

MORTGAGE—Effect of Transferring Note Secured.—A real estate mortgage given to secure a negotiable note is a mere incident to the debt, and passes with a transfer of the note. (p. 620.)

MORTGAGE and Note Should be Construed Together.—A note and mortgage executed and delivered as one transaction will be construed together; provisions in the mortgage relating to the indebtedness itself and attempting to modify the terms of the note will be construed with the note. (p. 621.)

MORTGAGE and Note Secured—Notice to Purchaser.—When a note and the mortgage securing it, together with an assignment of the mortgage, are sold and delivered, the purchaser must take notice of the provisions in the papers. (p. 622.)

BILLS AND NOTES.—Payment to the Original Payee of a non-negotiable note, without notice of any transfer thereof, discharges the paper. (p. 623.)

For a statement of the facts involved in this case, see the note which follows it, post, page 623.

Willis L. Hand, for the appellant.

Flansburg & Williams, for the respondent.

²⁹⁶ SEDGWICK, J. After the decision of *Garnett v. Meyers*, 65 Neb. 287, 94 N. W. 803, a rehearing was granted in this case, and in others involving the same questions. Upon this hearing the plaintiff's attorney has furnished us an able and exhaustive argument upon the questions involved, which has been of great assistance to us. Questions involving the negotiability of notes secured by mortgages and other collaterals have frequently been considered by this court. As early as 1876 it was determined in *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638, that "a bona fide purchaser, for value, of a negotiable promissory note, secured by mortgage, before maturity and ²⁹⁷ without notice, takes the mortgage as he does the note, discharged of all equities which may exist between the original parties," and also that "the mortgage is a mere incident to the debt and passes with it." These principles have been since adhered to, and so it was said in the first opinion of *Garnett v. Meyers*: "The long established and general rule is that if the note is in form negotiable, a sale and transfer of the note transfers the mortgage." In *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638, the security was in the form of

a deed of trust. Its sole object was to secure the payment of the note. It does not appear to have contained any provisions affecting or limiting the indebtedness itself, and the effect of such provisions when incorporated in the mortgage or deed securing the note was not considered.

2. That the note and mortgage, when executed and delivered together as one transaction, will be construed together, is not a new doctrine in this state: *Grand Island Savings etc. Assn. v. Moore*, 40 Neb. 686, 59 N. W. 115, and *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612, 70 N. W. 220, were cited as establishing the proposition as the doctrine of this court. In the former case there is a somewhat extensive discussion of the question, and the conclusion is that the provision in the mortgage that "if the mortgagors should fail to pay the money when due . . . the plaintiff might elect to pay the same and declare the whole amount due and payable at once" gave the holder of the papers the right upon such failure "to elect to declare the whole debt due, not only for the purpose of foreclosing, but also for the purpose of enforcing the personal liability." The conclusion is fortified by the consideration and discussion of authorities from this and other courts, and is considered as settling the law of this state upon that question. In the course of the opinion it is said: "The writer was at first of the impression that where the note is absolute and the mortgage contains such a provision, the provision should be restricted to the remedy by foreclosure, rendering the debt due for the purpose of foreclosure only, but leaving the maturity of the debt for the purpose of enforcing the ~~208~~ personal liability to be determined by the note itself. The adjudications do not, however, bear out this view. In this state it has been determined that in deciding such questions the note and mortgage should be construed together: *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Lantry v. French*, 33 Neb. 524, 50 N. W. 679. This principle alone would not be decisive of the question, for the reason that, construing the two instruments together, the fact that the stipulation referred to was contained in the mortgage and not in the note, might be taken as an evidence of the intention of the parties to restrict the effect of the stipulation to the enforcement of the mortgage. . . . *First Nat. Bank of Sturgis v. Peck*, 8 Kan. 660, was a suit upon notes under similar conditions. The court there held, in an opinion by Brewer, J., that the notes and mortgage were to be construed together, that all the notes became

due upon the failure to pay one, and that the statute of limitations ran against all from that time." It may be said that this opinion determines the law of this state to be that conditions inserted in the contemporaneous mortgage which clearly and necessarily relate to the indebtedness itself, and manifestly constitute an attempt to modify or enlarge the terms of the note will be construed with the note, and parties chargeable with notice of such provisions will be bound thereby. This decision, so far as the writer is aware, has not been criticised by this court, but, on the other hand, has been followed as authority, and it is not perceived that parties dealing with commercial paper have cause to complain of such a rule. The rule itself does not trench upon the sacredness of commercial paper under the law merchant. The parties who attempt to make a promissory note mean one thing to one person and another thing to other persons; who want to hold the note out to the world to be that which they have expressly agreed it shall not be; who seek to set it afloat with a string attached which may or may not be used to control the note as their interests may thereafter demand, are responsible for the uncertainty that attaches to such securities. If doubtful, ²⁹⁹ conflicting, and uncertain provisions in the contract result in rendering such papers non-negotiable, the remedy is to limit the provisions of the mortgage to their proper functions of securing the indebtedness, and define the terms of the indebtedness in the note which is given for that purpose: See, also, *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612, 70 N. W. 220; 1 *Randolph on Commercial Paper*, 198.

3. The note and mortgage, together with an assignment of the mortgage, were sold and delivered to the plaintiff. It is idle to argue that under such circumstances the plaintiff was not bound to take notice of the provisions of the papers which he purchased.

4. The provision of the mortgage which was held to affect the negotiability of the note is copied in full in the first opinion in *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400. The note and mortgage in this case were identical in their provisions with the papers involved in *Garnett v. Meyers*. Upon this hearing it was strenuously contended, and is ably and exhaustively argued in the brief, that these provisions were not intended to and did not affect the indebtedness itself, but relate only to the security, and ought not, therefore, to render the note non-negotiable.

The question thus presented is not free from difficulty, but we are inclined to adhere to the construction placed upon these provisions upon the second hearing of *Garnett v. Meyers*, 65 Neb. 287, 94 N. W. 803. After fully providing for the protection of the securities, other conditions are inserted which seem to have no meaning, unless they are construed to protect the holder of the securities against taxes that may be imposed upon these securities. If this is their meaning and intention, there can be no doubt that such conditions render the amount that the mortgagor may be compelled to pay upon the indebtedness, as a part thereof, uncertain; which would clearly render the paper non-negotiable. The papers being non-negotiable, payment to the original payee without notice to the payor of any transfer of the papers will discharge the paper.

The brief and argument of appellant are mostly employed 300 in the consideration of questions of fact as disclosed by the evidence. But these considerations are unimportant in view of the conclusion reached in the foregoing discussion which requires a reversal of the judgment below.

The judgment heretofore rendered is vacated, the judgment of the district court is reversed, and the cause remanded with instructions to dismiss the case.

The Principal Case was first before the supreme court in 65 Neb. 291, 91 N. W. 399, on an appeal by the defendant from a decree foreclosing a mortgage. The following is a part of the opinion rendered:

"The note and mortgage were executed by the defendant Thomas E. Moore and wife to the Globe Investment Company. The defendant, Bank of Miller, afterward bought the mortgaged property subject to the mortgage, and now defends in this case. Soon after the note and mortgage were executed and delivered the payee, the Globe Investment Company, sold the papers to parties who afterward, and before the note became due, sold and assigned them to the plaintiff. Afterward the defendant bank paid the mortgage note in full to the original payee, the Globe Investment Company, but payment has not been made to this plaintiff. . . .

"The appellant in his brief urges that the note was not negotiable because of agreements contained in the mortgage that the maker should pay insurance premiums and taxes on the mortgaged premises, and that if the maker failed to pay in accordance with the terms of the paper, the mortgagee or his assigns might declare the whole debt due and payable at once, or might elect to pay the taxes and insurance, and even in such case might declare the whole debt due.

"The note and mortgage, having been executed at the same time, and having been transferred together must be construed together,

and the provisions of the mortgage relating to the indebtedness itself would have the same effect as though they were incorporated in the note; but the provisions referred to relate only to the security, which is collateral to the indebtedness, and such provisions do not affect the negotiability of the note. There is no agreement to pay the taxes that might be assessed upon the indebtedness itself, nor any other provision which would render the amount of the indebtedness or the time of the payment uncertain within the rule adopted by this court. In *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37, it was held that neither the provision to pay attorney's fee, nor that if default be made in the payment of any interest coupon, the principal sum may at the option of the holder become due and payable without further notice, would affect the negotiability of the note; and the provisions of this note are within the same rule."

The Case of *Garnett v. Meyers*, 65 Neb. 280, 287, 91 N. W. 400, 94 N. W. 803, referred to in the principal case, was an appeal by the plaintiff from a decree rendered in a suit to foreclose a mortgage given to secure a note. On the original hearing of the case, the supreme court said in part:

"It is insisted that the contract upon which this action was brought is not negotiable, and that, as the mortgagor had no notice of the assignment, payment to the original mortgagee is a satisfaction of the claim. The note, otherwise in the usual form of a promissory note, has the following memorandum upon its face: 'This note is secured by a first mortgage on the N. W. $\frac{1}{4}$ sec. 7, tp. 23, R. 6 west, 6th P. M., Antelope county, Nebraska.' And the mortgage contains among other things, the following provision: 'The said parties of the first part hereby agree to pay all the taxes and assessments levied upon the said premises and all taxes and assessments levied upon the holder of this mortgage for and on account of the same when the same are respectively due; and if not so paid, the said party of the second part, or the legal holder or holders of said note may, without further notice, declare the whole debt hereby secured due and payable at once, or may elect to pay such taxes, assessments and the amount so paid shall be secured by this mortgage and may be collected in the same manner as the principal debt hereby secured, with interest at the rate of ten per cent per annum. But whether the legal holder or holders of said note elect to pay such taxes, assessments or not, it is distinctly agreed that the legal holder or holders of said note may declare the debt thereby secured due and immediately cause this mortgage to be foreclosed.'

"The agreement to pay taxes on the lands mortgaged or to keep up the improvements, or not permit or suffer waste thereon, or provisions of like nature, contained in the mortgage, do not destroy the negotiability of the note, because they do not relate to the principal indebtedness, and do not render the amount thereof uncertain. Such provisions relate to the security, which is collateral to the principal

indebtedness, and are proper provisions of the mortgage as such to insure the maintenance of the security as originally given."

On a rehearing of the case, however, the court reached a different conclusion. The following is the opinion rendered:

"In the former opinion in this case it was held that the provisions there quoted from the note and mortgage did not destroy the negotiability of the note. A rehearing was allowed mainly for the consideration of that question. The oral arguments on this hearing were largely devoted to two propositions:

"1. Should the conditions of the mortgage as distinguished from those in the note itself be held to affect the negotiability of the note? Upon this question we are entirely satisfied with the views expressed in the former opinion. If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterward allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself. The mortgagee has no interest in the mortgaged property except a collateral and contingent one. The liability for these expenses is upon the mortgagor. If he shirks this responsibility and compels the mortgagee to assume it, equity allows the mortgagee to add the payment so made to his mortgage. This right has long been established as an essential element of the mortgage itself. It cannot be held to destroy the negotiability of the note, unless the fact that the execution of the note is accompanied by the execution of a mortgage securing it is to have that effect. This principal applies to all agreements of the mortgagor to preserve the collateral security. It does not affect the rule that the two instruments when executed at the same time must be construed together. The provisions contained in the mortgage to protect the securities, which would be implied and enforced upon settled principles of equity, whether expressed in the mortgage or not, cannot be held to render the note non-negotiable. As shown in the former opinion, provisions as to the indebtedness itself should properly be, and generally are, expressed in the note. If agreements in regard to the indebtedness are inserted in the accompanying paper executed at the same time with the note, and as a part of the same transaction, they must be construed with the note. If such agreements rendered the amount that the holder of the note can demand on the indebtedness itself uncertain, the note is non-negotiable in the hands of one who takes it with notice. The reasonableness of this rule would probably not be doubted in case the accompanying paper was not a mortgage, but was executed for the sole purpose of modifying the terms of the note, or to make its payment depend upon condi-

tions expressed in the accompanying paper. The reason seems to be equally apparent when modifications of the terms of the note or limitations imposed upon the collection of the indebtedness itself are inserted in the accompanying mortgage. Such provisions in the mortgage are to be construed with the note. If the contract, so construed, renders the amount that may be demanded upon the indebtedness itself uncertain, one who takes the note, with notice of the limitations in the mortgage, is not entitled to protection as an innocent holder.

"It is said by the plaintiff that there are two causes of action—one at law upon the bond, seeking personal liability regardless of the lien; the other a proceeding to enforce the security regardless of the personal liability.' This is true, but in an action at law upon the note, and without seeking to enforce the security, the plaintiff no doubt might allege that in a writing executed with the note, and as a part of the same transaction, it was agreed that the maker of the note should pay taxes that might be assessed against the holder of the note by reason thereof, and that such taxes were assessed and had been paid by the note holder; and there is no doubt that such taxes so paid might, in such an action, be included in the recovery. If such recovery could be had when the agreements to pay such taxes were in an accompanying paper executed for that purpose alone, no reason is perceived why recovery might not also be had in the same manner if such agreements were contained in a mortgage executed at the same time with the note and as a part of the same transaction.

"2. Do the provisions of this mortgage relating to the indebtedness itself render the amount that may be demanded thereon by the holder uncertain? Upon this hearing we have been assisted by a strong brief and able argument upon this question. We quote from the brief: 'It is said in the body of the opinion that the provision was "plainly intended to meet the conditions which obtain in some jurisdiction, where the taxes chargeable against lands are assessed against both mortgagor and mortgagee in proportion to their several estates in the land."' By what process of reasoning is this made so plainly to appear? The mortgagors had already positively agreed in the following language: "The said parties of the first part hereby agree to pay all taxes and assessments levied upon said premises"—meaning the real estate covered by the mortgage. This provision seems to be as broad as language can make it, and certainly would be construed to cover any part of the taxes against the real estate that the mortgagee might become liable for. All cannot be construed to mean less than the whole. It would seem, then, to be the duty of the court to give some meaning and force to the further agreement to pay all taxes and assessments levied upon the holder of the mortgage for and on account of the same. It seems perfectly plain to the writer that the latter provision was intended to cover the tax for which the holder of the mortgage would thereafter be

come liable on account of the ownership of the credit represented by the mortgage and note.'

"This reasoning seems to us to be sound. To construe the provisions in question to mean that the mortgagor should pay all taxes levied on the premises including taxes charged against the holder of the mortgage on account of the mortgaged property, is not so obvious and natural as to treat the word 'same' as relating to the word 'mortgage,' as its near position in the sentence would indicate, rather than to the more remote 'premises.' If the former meaning were intended, the expression 'including all taxes levied,' etc., would have been more apt than the expression used. Giving the ordinary and natural meaning to all the words used in the provisions, it seems to us, upon further consideration, that the intention was that the mortgagor should not only pay the taxes assessed against the mortgaged property, but also the taxes that the mortgagee might become liable for as the owner of the credit represented by the paper. Such credits are taxable under the laws of this state, and therefore presumably so in other jurisdictions. When levied they are not a lien upon the mortgaged property, but are collectible from the holder of the credit as any other personal taxes. The amount, then, that may be demanded upon the note would depend upon uncertain conditions 'that cannot be controlled by the holder of the paper,' and as pointed out in the former opinion, would destroy the negotiability of the paper. The note not being negotiable, the plaintiff, who purchased and took the mortgage with the note, must be held to have had notice of its conditions, and is not an innocent purchaser. Under such circumstances, payment to the original payee by the mortgagor, who had no notice of the transfer of the papers, would satisfy the mortgage.

"The former judgment of this court is vacated and the judgment of the district court affirmed."

A Mortgage and the Note secured, executed at the same time and as one transaction, are to be construed together: *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, 61 N. W. 431, 26 L. R. A. 765; *Schultz v. Plankinton Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346.

A Mortgage and the Notes secured are negotiable: *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585, 76 N. W. 96. See, too, *Valley Nat. Bank v. Crowell*, 148 Pa. St. 484, 33 Am. St. Rep. 324, 23 Atl. 1068, 16 L. R. A. 49; *Alberston v. Laughlin*, 173 Pa. St. 525, 51 Am. St. Rep. 777, 34 Atl. 216.

CITY OF GENEVA v. BURNETT.

[65 Neb. 464, 91 N. W. 275.]

NEGLIGENCE—Petition Omitting the Word "Negligence."—If, in an action for personal injuries, the inference of negligence is inevitable from the facts narrated in the petition, the omission of the word "negligence" in the pleading does not render it defective. (p. 628.)

EVIDENCE—X-Ray Pictures are Admissible in evidence, in an action for personal injuries, to show the condition of the interior tissues of the injured member. (p. 629.)

J. D. Hamilton and Charles H. Sloan, for the plaintiff in error.

Robert J. Sloan, for the defendant in error.

⁴⁶⁴ AMES, C. The defendant in error, plaintiff below, alleged in her petition that on the twelfth day of December, 1898, she suffered personal injury from a loose board forming part of the structure of one of the sidewalks in the city of Geneva, and "that said board was lying loose across the stringers in said sidewalk, not being nailed to any of them. And that said board was loose and that said sidewalk was in ⁴⁶⁵ bad condition and repair, was well known to the mayor and council of said city and to the officers whose duties it was to repair and oversee the same. And that for a long time previous to the twelfth day of December, 1898, and ever since said date the authorities above mentioned allowed said sidewalk to be and remain in a dangerous condition." A general demurrer was interposed to this petition; supported by the argument that it does not sufficiently allege that the city authorities were negligent with respect to the matter complained of. The demurrer was properly overruled. If the circumstances were such as the petition narrates, the inference of negligence is inevitable. The use of the word "negligence" would not have made the charge any more specific or emphatic. Its omission from the pleading, therefore, did not render the document defective. The answer denied "that the said walk was unsafe and dangerous, or that it had any notice of such defect in the walk and that the defect, if any, which caused the injury was latent and unknown to it, although it had used diligence in the premises." This is an admission of the defect charged, coupled with a denial of notice and negligence. It is like a denial that a note is genuine, coupled with an allegation that, if genuine, it was ob-

tained by fraud. A party cannot deny and confess and avoid the same cause of action in the same pleading: *Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872. The answer also alleged that if the plaintiff had suffered any injury it was incurred by her own carelessness, without the fault or negligence of the defendant. The reply was a general denial. The evidence concerning all matters in issue was conflicting. The plaintiff recovered a verdict and judgment, which the defendant seeks to set aside by this proceeding.

The plaintiff testified that her foot and ankle, which were injured by the accident, were previously thereto in a sound and healthy condition, and that the injury had produced a permanent, or at least prolonged disability. Some medical men testified that one of the consequences ⁴⁰⁰ of the injury was, or might probably be, a calcareous deposit in the tissues of the foot, and that they had examined the foot of the plaintiff, who was a young person, by means of an apparatus for making or taking what are called "X-ray pictures" of it, which disclosed the presence of such a deposit, and that, in their opinion, the deposit was the result of the injury. Plaintiff in error objects because some of the pictures so obtained were admitted in evidence. There was a very thorough and complete explanation of the time, manner and circumstances of the taking of the pictures, and of the condition of the foot which they were supposed to indicate; but it is insisted that they were secondary evidence, and so not admissible. From the testimony of the witnesses, we are convinced that no better evidence of the condition of the interior tissues of the foot could have been obtained, without a surgical operation, to which the plaintiff was not called upon to submit. We do not think that the ruling complained of was erroneous.

Complaint is also made of the refusal by the court to give certain instructions requested by the plaintiff in error, but we think they are all of them substantially embodied in a series of instructions given by the court of its own motion, which fairly stated the law, and submitted the issues to the jury.

The verdict and judgment are moderate in amount, and we recommend that they be affirmed.

Duffie and Albert, CC., concur.

By the COURT. For reasons stated in the foregoing opinion, it is ordered that the verdict and judgment of the district court be affirmed.

That X-Ray Pictures are admissible in evidence in actions for personal injuries, see the monographic note to Baustian v. Young, 75 Am. St. Rep. 474; De Forge v. New York etc. R. R. Co., 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669.

SHELBY v. CREIGHTON.

[65 Neb. 485, 91 N. W. 369.]

JUDGMENT—Estoppel Extends to Premises.—If a judgment is necessarily drawn from certain premises, they are as conclusive as the judgment itself. (p. 635.)

TRUSTS.—A Purchase of Trust Property of the Trustee is not necessarily void; the cestui que trust has a right to affirm the sale, and an affirmance will be implied from an unreasonable delay in making an election. (p. 636.)

WHERE AN ADMINISTRATOR Purchases Part of His Decedent's Property, a final order approving his accounts and discharging him is conclusive on all parties of every matter involved, including the validity of the sale. (p. 637.)

JUDGMENT—Vacation for Fraud and Imposition.—A suit in equity to set aside a decree for fraud and imposition cannot be maintained where the evidence fails to show that the plaintiff was not as fully cognizant of the manner in which the decree was obtained at the time of its entry as she was when the suit for relief was commenced. (p. 638.)

ADMINISTRATOR'S SALE—Laches.—The Right to Question the validity of a sale of a decedent's property, on the ground that the administrator purchased thereat, may be barred by laches. (p. 638.)

William D. Beckett and J. W. Woodrough, for the plaintiff in error.

James W. Woolworth and William D. McHugh, for the defendant in error.

486 ALBERT, C. On the fifth day of November, 1874, Edward Creighton died intestate at Omaha, leaving a large estate, consisting of both real and personal property. He left no issue, and his personal estate descended to his wife, whom we shall hereafter refer to as Mrs. Creighton. On the twentieth day of March, 1875, the defendant was appointed administrator of the estate of the intestate by the county court of Douglas county. At the time of his death the intestate was a member of the firm of E. Creighton & Co., which owned a herd of cattle ranging in Nebraska and Wyoming, and in the possession of T. A. McShane. In

January, 1875, Charles Hutton was appointed administrator of the estate of the intestate in Wyoming by the probate court of ⁴⁹⁷ Albany county. Under the laws of that territory in force at that time the administrator was required to include the whole of the partnership property in his inventory, appraised at its true value, carrying out in the footings an amount equal to the intestate's interest therein. A surviving partner was then permitted to retain possession of such property upon giving the bond required by law, and to close the partnership affairs. He was required to account to the probate court after the manner of an administrator. In pursuance of these provisions, on the twenty-fourth day of July, 1875, T. A. McShane, having made a showing to the effect that he was a surviving partner of the intestate in said firm, gave the statutory bond, and from that time until 1877, administered on the partnership estate. On the twenty-third day of January, 1876, Mrs. Creighton died, leaving a will, whereby she bequeathed a specific sum and interest in the residuum of her estate to her executors, to be held and invested by them, the interest thereon to be paid to Joseph Creighton, during his lifetime, and thereafter to his children until the youngest surviving him should have attained its majority, when the principal sum should be divided and distributed among them. Herman Kountze, James Creighton and the defendant were named in the will as executors. The will was admitted to probate in the county court of Douglas county, and the executors named therein duly qualified and acted as such until the final settlement of the estate, except James Creighton, who resigned before the estate was closed. On the sixteenth day of January, 1877, the probate court of Albany county made an order directing the surviving partner, administering the firm property as aforesaid, to dispose of the cattle at public auction on the twenty-fifth day of January, 1877. In pursuance of this order, the surviving partner offered the property for sale at the place and in the manner directed by said order, and sold it to the defendant. On the twenty-seventh day of January thereafter he made report of the sale to the court directing same, which was duly approved and confirmed; and ⁴⁹⁸ on the same day he was appointed administrator de bonis non of the estate of the intestate in Wyoming, the letters granted to Charles Hutton having been revoked. On the sixth day of March, 1877, his final account as surviving partner was approved by the probate court, and the amount thereby shown to

be due the estate, in pursuance of an order of that court, passed from his hands as such partner, to him as administrator of the estate, and, subsequently, to the defendant as administrator of the domicile. The defendant as administrator of the domicile, having received the money, acting under an order of the county court of Douglas county, paid the same to the executors of the will of Mrs. Creighton, who distributed it with the other assets of the estate, in accordance with the terms of the will. On the twelfth day of March, 1883, the final account of the defendant as administrator of the estate of Edward Creighton was approved, and on the fourteenth day of March thereafter, he was discharged from his trust. On the sixteenth day of October, 1893, Joseph Creighton died, leaving the plaintiff, his only child, surviving him. On the eleventh day of November, 1893, Herman Kountze, and the defendant herein delivered to plaintiff in this case certain bonds and notes, and paid her a sum of money, which she acknowledged to be in full satisfaction and discharge of all liabilities due her as daughter and heir of Joseph Creighton, as well as of all liabilities due her in the estate of Edward Creighton, deceased, under the will of Mrs. Creighton. By writing under her hand of that date she released and discharged the defendant and Herman Kountze, as executors of the will of Mrs. Creighton and as trustees of the fund hereinbefore mentioned. The other executor had resigned before that time. On the fifteenth day of February, 1894, some question having arisen as to the regularity of the sale of the cattle in Wyoming to the defendant, Herman Kountze, and the defendant commenced an action in the district court for Douglas county against the plaintiff in this case and her husband, praying that an account might be taken of their dealings and transactions ⁴⁸⁹ in respect to their said trust, and asking that the accounting between them and the defendant be ratified and confirmed and they be discharged from all liability on account of the said trust. The defendants in the cause just referred to made default and a decree was rendered in accordance with the prayer of the petition. From the foregoing it will be seen that the sale of the cattle of the firm of E. Creighton & Co. to the defendant by T. A. McShane, as a surviving partner of the intestate, was in pursuance of an order of the probate court of Albany county, Wyoming, from which letters of administration on the estate of the intestate in that jurisdiction had issued and that at the time of such sale the defendant was administrator of the estate of the intes-

tate in Nebraska, and one of the executors and trustees under the will of Mrs. Creighton, to whom the whole of the personal estate of her husband, the intestate, had descended.

This action was brought and prosecuted on the theory that the sale of the cattle to the defendant was invalid and inoperative to change his trust relations to the property, because T. A. McShane was not in fact a surviving partner of the intestate in said firm, and, because of defendant's trust, he could not become a purchaser of the trust property in his own behalf. The plaintiff, therefore, as one of those in whose favor the trust was created by the terms of the will of Mrs. Creighton, asks, among other things, that the defendant be required to account for her share of all the said cattle, and the proceeds and profits arising therefrom.

The defense was conducted on the following lines: 1. That the order of the probate court of Albany county, Wyoming, whereby T. A. McShane was permitted to administer on the partnership estate and to wind up its affairs as surviving partner, is conclusive in this case on the question of his relation to said firm; 2. That his relations to the estate in Nebraska did not render him incompetent to purchase at a sale of its property in another jurisdiction by another administrator; 3. That by the ⁴⁹⁰ orders of the probate courts, and the decree of the district court, the plaintiff is estopped to question the validity of the sale; 4. That the plaintiff is bound by her settlement with the defendant and his cotrustees; 5. That the plaintiff has been guilty of laches in the premises; 6. That the action is barred by the statute of limitations. The trial court found for the defendant, and decreed accordingly. The plaintiff brings the case here on error.

On the question whether T. A. McShane was a member of the firm of E. Creighton & Co., in our opinion, the plaintiff is concluded by the proceedings had in the probate court of Wyoming. Chapter 47 of the Compiled Laws of Wyoming of 1876 relates to the settlement of the estates of decedents, and was in force when such proceedings were had. Five sections of that chapter are as follows:

"Sec. 45. The executor or administrator on the estate of any deceased member of a copartnership shall include in the inventory, which he is required by law to return to the probate court, the whole of the partnership estate, goods and chattels, rights and credits, appraised at its true value, as in other cases, but the appraisers shall carry out the footing an amount equal

only to the deceased's proportional part of the copartnership interest.

"Sec. 46. The property thus appraised shall remain with the executor or administrator, or be delivered over, as the case may be, to the surviving partner, who may be disposed to undertake the management thereof, agreeably to the conditions of abond, which he shall be required to give to the territory of Wyoming, in such sum, and with such securities as is required in other cases of administration.

"Sec. 47. The condition of such bond shall be, in substance, as follows: 'The condition of the above bond is, that if A B, surviving partner of the late firm of ———, shall use due diligence and fidelity in closing the affairs of the late copartnership, apply the property thereof toward the payment of the partnership debts, render an account, upon oath to the probate court, whenever by it ⁴⁹¹ thereunto required, of all the partnership affairs, including the property owned by the late firm, and the debts due thereto, as well as what may have been paid by the survivor toward the partnership debts, and what may still be due and owing therefor, and pay over, within one year, unless a longer time be allowed by the probate court, to the executor or administrator, the excess, if there be [any] beyond satisfying the partnership debts, then the above bond to be void, otherwise to remain in full force.'

"Sec. 48. The probate court shall have the same authority to cite such survivor to account, and to adjudicate upon such account, as in case of an ordinary administrator, and the parties interested shall have the like remedies, by means of such bond, for any misconduct or neglect of such survivor, as may be had against administrators.

"Sec. 49. In case the surviving partner, having been duly cited for that purpose, shall neglect or refuse to give the bond required in the forty-sixth and forty-seventh sections of this title, the executor or administrator on the estate of such deceased partner, in giving a bond, as provided in the following sections, shall forthwith take the whole partnership estate, goods and chattels, rights and credits, into his own possession, and shall be authorized to use the name of the survivor in collecting the debts due the late firm, if necessary; and shall with the partnership property pay the debts due from the late firm, with as much expedition as possible, and return or pay to the surviving partner his proportion of the excess, if there be any."

From the foregoing it appears that the probate courts of that territory, in addition to the jurisdiction ordinarily exercised by such courts in probate matters, had jurisdiction to adjust the account between a surviving partner and the estate of his deceased copartner, and to supervise the winding up of the partnership affairs. To that end, a surviving partner, upon compliance with the provisions of sections 46 and 47, *supra*, was permitted to administer on the partnership estate and was held to account after the manner of an administrator. While the cattle in ⁴⁹² question sometimes crossed the Nebraska line, it sufficiently appears that such instances were rare and accidental, and that their real situs was in Wyoming, and within the jurisdiction of the probate court which granted administration on the estate in that territory. Administration was granted on an application made in due form, and after service of process according to law. T. A. McShane, who was in possession of the cattle, claiming the right of possession as surviving partner of the intestate, was also within the jurisdiction of that court. The jurisdiction of the probate court in the premises was therefore complete, not only for the ordinary purposes of administration, but also for the purpose of adjusting the accounts of the said firm, and supervising the winding up of its affairs. After the jurisdiction of the probate court was complete and administration had been granted on the estate, T. A. McShane, made a showing to the court that the property in question was the property of the firm of E. Creighton & Co.; that he was a surviving partner of the intestate in such firm, and as such, made application to administer the firm property, in accordance with the provisions of the statute hereinbefore quoted. His application was granted. Subsequently, his final account of his administration as surviving partner was settled and allowed by the probate court, and he was discharged from his said trust. The decree of the probate court of Albany county, Wyoming, settling and allowing the account of T. A. McShane as surviving partner, is analogous to a decree settling and allowing the final account of an administrator. Such decrees are conclusive, upon all parties, of every matter involved, until reversed or set aside in a direct proceeding. 1 Herman on Estoppel, p. 392; 2 Black on Judgments, sec. 644. An estoppel by judgment or decree extends to all matters upon which it must have been founded. In other words, the judgment is a conclusion, and, if necessarily drawn from certain premises, such premises are conclu-

sive as the judgment itself: *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Perkins v. Walker*, 19 Vt. 144; ⁴⁹³ *Hayes v. Shattuck*, 21 Cal. 51; *Tuska v. O'Brien*, 68 N. Y. 446. The decree settling and allowing the final account of T. A. McShane as surviving partner, while a part of the probate proceedings, was in effect an adjustment of partnership accounts, and necessarily involved the question of his relation to the firm. That he was a member of such firm is a proposition necessarily involved in the decree. In our opinion, the decree is as conclusive upon that proposition as one adjusting the accounts between partners, entered by a court of equity, in a suit between partners brought for that purpose would be.

It is next urged by the plaintiff that the defendant, by reason of his trust relations to the property, was not competent to purchase, and consequently that the sale to him was void. The argument on this point proceeds on the assumption that a purchase by a trustee of trust property is void at all times and under all circumstances. Loose expressions of some courts and text-writers would appear to warrant that assumption, but the weight of authority is against it: *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36 L. ed. 134; *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Munn v. Burges*, 70 Ill. 604; *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146; *Musselman v. Eshleman*, 10 Pa. St. 394, 51 Am. Dec. 493; *Foxworth v. White*, 72 Ala. 224; *In re Patterson* (N. J.), 20 Atl. 486; *Morgan v. Fisher*, 82 Va. 417. The rule appears to be that, on the purchase of property by a trustee, the cestui que trust has the option to take the benefit of such purchase, or to treat the sale as valid, but his decision must be made within a reasonable time. An affirmance of the sale will be implied from an unreasonable delay. In addition to the foregoing cases, see *Wisswall v. Stewart*, 32 Ala. 433, 70 Am. Dec. 549; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Jackson v. Walsh*, 14 Johns. (N. Y.) 407; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691. Assuming, then, that the defendant stood in the relation of trustee to the property in question—a point we do not decide—still the sale to him, at most, was voidable, and one which the plaintiff, or others bearing the relation of cestui que trust ⁴⁹⁴ to the property had the unquestionable right to affirm. The final accounts of the defendant as administrator of the estate of Edward Creighton were approved and allowed by the county court of Douglas county in 1883, and the adminis-

trator discharged. Before that time it was a matter of record in that court that he was the purchaser at the sale of the property in question. The proceeds were accounted for by him, and distributed as part of the assets of the estate, under an order of the court. Mrs. Creighton was sole heir to the personal estate. Her interest therein, and the amount thereof she would have received, had she lived, would have been measured by the decree of distribution, based on the approved accounts of the administrator. On her death, her interest passed to her executors, but would still be measured by the same standard. The plaintiff claims under the will of Mrs. Creighton, and of necessity, her claim must be for a share of the interest thus ascertained. In other words, in the absence of special circumstances which do not appear in this case, the decree of the county court is as binding on the plaintiff as it would have been on Mrs. Creighton, had she lived. The jurisdiction of the county court of Douglas county over the estate of Edward Creighton is unquestioned. Due notice of the time and place of the hearing on the final settlement of the administrator was given. Personal service of such notice was had on the plaintiff in this case. No objection was lodged by her against the accounts of the administrator, nor was any complaint made by her of the sale in question. She was under no disability. The final decree of the county court in the premises has never been reversed, vacated or set aside. Such decree necessarily involves an approval of the accounts of the administrator, and as such accounts included the proceeds of the sale of the property in lieu of the property itself, and were approved by the court with full knowledge of the fact that the sale had been made to the defendant, the approval of such accounts was an approval and affirmance of such sale. Such a decree is conclusive on all parties to it, of every ⁴⁹⁵ matter involved, and constitutes a bar to further proceedings concerning the same matter, not only in courts of probate jurisdiction, but in all other courts: *Hartman's Appeal*, 36 Pa. St. 70; *Baker v. Runkle*, 41 Mo. 391, 392; *Bulkley v. Andrews*, 39 Conn. 523, 524; *McWilliams v. Kalbach*, 55 Iowa, 110, 7 N. W. 463; *Waring v. Lewis*, 53 Ala. 615. Acquiescence in such decree by the plaintiff must be held to amount to an election on her part to affirm the sale. In our opinion, the plaintiff is concluded, on the question of the validity of the sale to the defendant, by the final decree in the matter of the estate of Edward Creighton.

But it is insisted on behalf of the plaintiff that such decree was obtained by fraud and imposition. Were that conceded, still the decree would not be void, but binding until set aside in a proper proceeding: *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *McRae v. Mattoon*, 13 Pick. (Mass.) 53; *Smith v. Smith*, 22 Iowa, 516. If it be urged that a part of the relief sought in this action is to set aside that decree the answer is that the evidence fails to show that the plaintiff was not as fully cognizant of the manner in which the decree was obtained at the time it was entered, as she was when this suit was commenced. Therefore, she has not shown herself entitled to such relief, and the decree stands a bar to her recovery in this action. The foregoing, we think, disposes of this case. It may not be out of place to add that the sale took place more than twenty-five years ago. It stood unchallenged by the plaintiff for more than twenty years. For fifteen years of that time the fact of the sale and that it had been made to the defendant was, as we have seen, a matter of record, in a proceeding to which the plaintiff was a party, and of which she had notice by personal service of process. The sale was before the probate court in Wyoming, in 1877. It was before the county court of Douglas county in the settlement of the estate of Edward Creighton in 1883. It was, at least incidentally, before the same court in the matter of the estate of Mrs. Creighton. Plaintiff's attention, in the nature of things, must have been invited ⁴⁹⁶ to it in her settlement with the defendant and his cotrustee in 1893. Investigation was again invited by the action brought by the defendant and his cotrustee in the district court of Douglas county in 1894 against the plaintiff for the re-examination and approval of their accounts as trustees under the will of Mrs. Creighton, in which, acting on the advice of counsel, the plaintiff in this case, suffered default. Her first complaint of the sale appears to have made in 1898 when this action was commenced. It is not shown that she was under any disability during any portion of this time. She was not examined as a witness in this case. In view of the circumstances, ignorance of the facts during all these years can not be imputed to her. While we have put the decision on other grounds, it seems to us that, in the light of all the facts, the finding of the district court that the plaintiff's cause of action is barred by her own laches, as well as by the statute of limitations, is amply warranted.

It is recommended that the decree of the district court be affirmed.

Duffie and Ames, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

The Purchase of trust property by the trustee is not necessarily or absolutely void: See the monographic note to Tyler v. Herring, 19 Am. St. Rep. 289. See, also, Sacramento Bank v. Copsey, 133 Cal. 663, 85 Am. St. Rep. 242, 66 Pac. 8, 205; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655. And a purchase by an executor or administrator of the estate of the decedent is merely voidable: Melms v. Pabst Brewing Co., 93 Wis. 153, 57 Am. St. Rep. 399, 66 N. W. 518. See, also, Houston v. Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252; Comegy v. Emerick, 134 Ind. 148, 39 Am. St. Rep. 245, 33 N. E. 899; Linman v. Riggins, 40 La. Ann. 761, 8 Am. St. Rep. 549, 5 South. 49.

HARRISON NATIONAL BANK v. AUSTIN.

[65 Neb. 632, 91 N. W. 540.]

AGENT, PAYMENT TO—Evidence of the Indebtedness.—

That a person to whom money due another is paid is not in possession of the instrument by which the indebtedness is evidenced, is not conclusive of his authority, or lack of it, to collect the money. (p. 643.)

AGENT, PAYMENT TO—Estoppel of Principal.—

Where a principal has placed his agent in such a position with reference to a note and mortgage that a person of ordinary prudence, conversant with business usages, is justified in presuming him authorized to collect the amount due, payment to him discharges the obligation. (p. 644.)

AGENT, AUTHORITY OF, Inferred from Other Transactions.—

The authority of an agent to do a particular act in connection with a transaction may be inferred from proof that his principal authorized or ratified similar acts in connection with past transactions intrusted to him under similar circumstances. (p. 644.)

Abbott, Selleck & Lane and John S. Bishop, for the appellant.

Charles G. Ryan, Charles W. Meeker and William O'Connor, for the respondent.

KIRKPATRICK, C. This is a suit brought in the district court for Chase county by appellant, Harrison National Bank, against Cyrus O. Austin and others to foreclose a mort-

gage given by Austin to C. C. Burr on May 31 1890, due June 1, 1895, which note and mortgage was by Burr indorsed, assigned and delivered to appellant long before maturity. The petition is in the usual form. The answer admits the execution and delivery of the note and mortgage, and pleads payment of the sum by Edward Kuse, who purchased the premises subject to the mortgage to Burr, who, it is alleged, was the agent of appellant bank, and that such money had been paid by Burr to the bank. To this answer was filed by way of reply a general denial. Trial was had, which resulted in a finding and judgment for appellee Kuse, holding that the note and mortgage had been satisfied by the payment to Burr, and decreeing the mortgage to be no lien upon the premises. The case is brought to this court on appeal by the Harrison National Bank, and the only question ⁶³⁴ presented by the record is whether or not the decree of the trial court is sustained by sufficient competent evidence.

It is disclosed by the record that appellee Kuse paid to C. C. Burr, on the seventh day of January, 1893, long before the note was due, the face of the note and mortgage, with interest accrued up to that time. Burr executed a release in satisfaction of the mortgage, which he delivered to appellee, who placed it of record in Chase county. It is clearly established by the evidence that C. C. Burr was the agent for appellant in the matter of negotiating farm loans in Nebraska, and that during the time he acted as such agent, he placed farm loans upon land in various counties in the state to a sum amounting to about two hundred and fifty thousand dollars. The method which seems to have prevailed in the transaction of the business between Burr and appellant was as follows: Appellant, by J. M. Sharon, its cashier, would write a letter to Burr, directing him to send them a certain amount of farm loans; e. g., from three to ten thousand dollars' worth. Agents for Burr in different counties in the state, on being notified to do so, would take applications for farm loans, and send them to Burr at Lincoln. Such as were satisfactory to him were accepted, and he would thereupon prepare notes and mortgages to be sent to the agent to be signed and executed by the borrowers. The mortgage, when executed, would be placed of record, abstracts prepared, and the note and mortgage of the borrower, and the abstract showing the recording of the mortgage would be forwarded to Burr, who would send the papers, accompanied by a sight draft, through the First National Bank at Lincoln to

appellant at Cadiz, Ohio. The testimony shows that so far as the business agency of Burr with appellant is concerned, the former did not take these applications for loans and make the loans thereon except upon orders coming to him from appellant. All of the business was transacted by Burr, and while, as appears from the letters written by the officers of appellant bank, Burr was admonished to take only good, first-class farm ³³⁵ loans, yet it does not appear that in any instance loans sent in by him in pursuance to such orders were rejected by appellant. Burr indorsed the notes, and usually assigned the mortgages. The notes were payable at the First National Bank of Lincoln, Nebraska. It is contended by appellant that it purchased these notes and mortgages in the usual course of business, and that Burr was not in any sense acting as its agent in placing the loans. The transactions between the parties regarding the placing of loans will not bear the construction placed on their relations contended for by appellant. It does not appear that Burr had any money invested in any of the loans; but that uniformly, after drawing a sight draft on appellant bank, would give his check to the party to whom the money was loaned. There can be no doubt that Burr was simply acting as the agent of appellant in placing these loans.

The transactions between Burr and appellant amounted to the sum, it is claimed, of two hundred and fifty thousand dollars, and extended over a period of many years; at least from the spring of 1888, up to the latter part of 1894, and for a period of about a year after the loan in question was paid. Sometimes, before the coupons upon the loans handled by Burr came due, he would send out a notice to the mortgagors, notifying them of the amount of interest, and the maturity of the same, and request prompt remittance to him at Lincoln. The same course was followed at the maturity of the principal notes. There seems to have been no correspondence and no business connections of any description between the borrowers of the money and appellant, but Burr seems to have had exclusive charge of the loan business in Nebraska for appellant. Burr kept an open account with appellant bank in the name of J. M. Sharon, its cashier, which account he credited with all coupons and principal notes collected, and in which he charged appellant for all items remitted. Burr testified that he collected more than seventy-five thousand dollars in the manner indicated, all of which belonged to appellant. When mortgages became due and were not paid, Burr, in many instances, proceeded to fore-

close, and took title in his own ⁶³⁶ name, and executed to appellant a mortgage and note for the amount of the original note, with interest. When mortgages matured and parties were not able to pay, in many instances Burr granted extensions, taking coupons signed by the parties, representing the accruing interest during the period of extension, and sending them to appellant. No objection was made by appellant to any of these transactions.

In Burr's testimony, he stated that he had received as many as three thousand letters from the officers of appellant bank, regarding the loan business being transacted for them by him. A number of these letters appear in the record, among which is the following, which is set out in order to explain the character of the business relations which appear to have existed between Burr and appellant:

"Cadiz, Ohio, Apl. 21st, 1894.

"C. C. Burr, Esq., Lincoln, Nebr.

"Dear Sir: Your favor of the 17th inst. is received, containing New York draft for \$36, which pays the balance due on the Thos. Murray \$400 loan, collected by you, and I enclose you the note, mort., rel. and abst. in same.

"You say in payment of balance due on Murray and the Misner loans. If you will refer to my letter of April 13, you will see that I said balance due on the Murray loan \$36, and balance due on the Misner loan \$20, making \$56 on the two. I see this bal. should be \$61.40. The \$122 credit reported was part of the T. D. Moulton \$250 note. Moulton has not yet paid all of this note.

"On another sheet I enclose you list of the loans you collected and showing credits on the same. [The accompanying list showing seventeen loans which had been collected by Burr, and payments credited thereon.]

"Yours truly,

"[Signed] J. M. SHARON, Cas."

From the correspondence in the record, and from other testimony, it is quite clearly established that Burr was permitted by appellant to manage these loans, collect both principal and interest, in all respects as though they were his own, appellant having apparently neither knowledge ⁶³⁷ nor concern about the borrowers themselves. The officers of appellant bank testified that these coupons and notes were sent to Burr for payment on account of his indorsement, and not for collection. It is suggested by counsel for appellee, and, we think, aptly, that

this claim of appellant is not consistent with sound business principles, nor is it the usual method pursued by banks having paper for collection. These notes and mortgages were made payable at the First National Bank at Lincoln, and the uniform custom of appellant in sending them to Burr instead of the bank cannot be reconciled with reason and sound business methods if the contention of appellant that they were sent to Burr as indorser or guarantor is to be credited. The fact that they were uniformly sent to Burr, taken in connection with the letters from appellant to Burr appearing in the record, showing, as they do, the custom of looking to Burr for the collection of overdue paper, quite conclusively establishes the contention of counsel for appellee that Burr was the agent of appellant, and was so regarded by it. Appellant seems to have availed itself of Burr's services in making these collections, placing loans and foreclosing mortgages, until it was discovered that Burr was in failing circumstances; and this, it appears from the record, was a discovery made about a year after the note and mortgage in suit had been paid. It was then that appellant made an investigation of its business in Burr's hands, and found that he had misappropriated some sixteen thousand dollars. Burr testified that the officers of appellant bank were in Lincoln on different occasions, staying in some instances several days, visiting at his office, and that they must have known of the manner in which he was doing business for them. It is true that Burr did not have the note and mortgage in suit in his possession at the time he made the collection; nor did he have them again after sending them to appellant; but this is only one of the circumstances which are to be taken into consideration in determining whether or not Burr was in fact the agent of appellant in the collection of the note and mortgage in ⁶³⁸ suit. In the case of *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938, this court said: "That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced, is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it." To the same effect is *Estey v. Snyder*, 76 Wis. 624, 45 N. W. 415, and *Dunn v. Hornbeck*, 72 N. Y. 80, 87. Although this note and mortgage, as well as other farm mortgages handled by Burr on behalf of appellant, were made payable at the First National Bank of Lincoln, appellant saw fit to send the note and mortgage direct to Burr for collection, and allowed him to deal with the borrowers for

a number of years in all respects as though he was the owner of the mortgages. In the case of *Johnston v. Milwaukee etc. Inv. Co.*, 46 Neb. 480, 64 N. W. 1100, this court said: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority": *Holt v. Schneider*, 57 Neb. 523, 77 N. W. 1086. In the case at bar, the apparent authority with which appellant clothed Burr, even if he was not in fact its agent, and the acceptance by appellant of all the benefits of his acts on its behalf, is such that justice requires that in this case appellant should sustain the loss. It conclusively appears from the exhibits in this case that Burr did frequently collect both principal and interest at the times when he did not have the notes or the coupons in his possession, remitting the amounts collected to appellant, who thereupon returned to him for delivery to the borrower the canceled evidences of the debts, and who in no instance objected to this course on the part of Burr. In *First Nat. Bank of Wilber v. Ridpath*, 47 Neb. 96, 66 N. W. 37, this court said: "When the extent of an agent's authority is in issue, no special instructions having been given to him, ~~and~~ his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and intrusted to the agent under similar circumstances." The testimony in the record is sufficient to establish the fact found by the trial court that Burr was the general agent of appellant in Nebraska for the negotiation and collection of farm loans which it had made through Burr, and the right to collect the note before due sufficiently appears from his custom, ratified by appellants, of granting extensions, and renewals of other loans. This he apparently did wholly without objection on the part of appellant, and his acts concerning which were ratified by appellant when brought to its notice.

It appears that the findings and judgment of the trial court are sustained by sufficient competent evidence, and are right, and it is, therefore, recommended that the same be affirmed.

Hastings and Day, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

One Who Holds Out Another as His Agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such person is authorized to act as his agent, will not be allowed to deny the agency to the prejudice of an innocent party who has been led to rely upon the appearance of authority in the agent: *Union Stockyard etc. Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888. See, too, *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279, 63 N. E. 245, 64 N. E. 647.

MERRILL v. WRIGHT.

[65 Neb. 794, 91 N. W. 697.]

A WRIT OF ASSISTANCE Will Issue Only Against Parties to a suit, or persons in privity with them, who have been concluded by a decree, and yet refuse to permit the purchaser at judicial sale thereunder to take possession. (p. 646.)

WRIT OF ASSISTANCE.—Questions of Title are not to be tried on an application for a writ of assistance, as against persons in possession claiming adversely to the parties and not bound by the decree. (p. 646.)

WRIT OF ASSISTANCE.—It is Error to Award a writ of assistance against one who entered upon land pendente lite, claiming an independent title not derived from, or in succession to, any of the parties to the suit or their privies. (p. 646.)

WRIT OF ASSISTANCE.—Possession Under Void Tax Deed.—One in possession in good faith under a void tax deed claims by an independent title, and will not be dispossessed under a writ of assistance. (p. 647.)

LIS PENDENS.—The Purpose of the Rule of Lis Pendens is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting relief sought. (p. 647.)

LIS PENDENS.—Independent Titles.—The rule of lis pendens has no application to independent titles not derived from any of the parties to the suit nor in succession to them. (p. 647.)

LIS PENDENS.—Statutory Scope of.—Section 85 of the Nebraska Code of Civil Procedure does not extend the rule of lis pendens so as to include all interests acquired by third persons pending suit, whatever their nature or source. (p. 648.)

W. A. Saunders and J. W. Woodrough, for the appellant.

H. W. Pennock, for the respondent.

705 POUND, C. In one form or another this cause has been before this court several times: *Merrill v. Wright*, 41 Neb. 351, 59 N. W. 787, 54 Neb. 517, 74 N. W. 955. It now comes up

on appeal from an order granting a writ of assistance, which presents a very curious state of facts. The suit was brought in 1892 to foreclose a tax lien. The owners of the property and those in possession under them were duly made parties.

There were two appeals, and sale was not had until 1902. Meanwhile one Scott had purchased the property for taxes subsequently assessed, and afterward taken a tax deed accordingly. Claiming under this deed, he brought an action of ejectment against the owners and those in possession, in the course of which he obtained a judgment. No direct attack seems to have been made upon this judgment, and a suit in equity to vacate it and set it aside resulted adversely to the plaintiffs therein: *Scott v. Wright*, 50 Neb. 849, 70 N. W. 396. After that suit was determined, Scott obtained possession by writ of restitution pursuant to the judgment. By this time sale had been had under decree of foreclosure, and the purchaser demanded possession by virtue of his deed. Not obtaining it on demand, application was made for a writ of assistance. The petition for the writ and the answer of Scott disclose, substantially, the facts above stated, and on such showing the writ was awarded.

We are of opinion that this is not a case for a writ of assistance. That writ may issue only against parties to a suit, or persons in privity with them, who have been concluded ⁷⁹⁶ by a decree, and yet refuse to permit the purchaser at judicial sale under such decree to take possession: *Terrell v. Allison*, 21 Wall. 289, 291, 22 L. ed. 634; *Howard v. Bond*, 42 Mich. 131, 3 N. W. 289. Questions of title are not to be tried on an application for the writ, as against persons in possession, claiming adversely to the parties, and not bound by the decree: *Barton v. Beatty*, 28 N. J. Eq. 412; *Exum v. Baker*, 115 N. C. 242, 44 Am. St. Rep. 449, 20 S. E. 448. It is error to award it against a person who had entered upon land pendente lite, claiming an independent title, not derived from or in succession to any of the parties to the suit or their privies: *Exum v. Baker*, 115 N. C. 242, 44 Am. St. Rep. 449, 20 S. E. 448; *Ricketts v. Chicago Permanent Bldg. etc. Assn.*, 67 Ill. App. 71; *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 580; *Toll v. Miller*, 11 Paige (N. Y.), 228; *Van Hook v. Throckmorton*, 8 Paige (N. Y.), 33. Without considering the merits of Scott's claim, the nature of the title asserted stamps it at once as new and independent. What rule should be applied if his possession under the tax deed and judgment in ejectment based thereon were

shown to be fraudulent and collusive, in order to defeat or hinder the foreclosure case, we need not decide. A void tax deed is color of title and as such may be the basis of an adverse possession: *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962. The claim of title acquired under it is adverse to, not derived from, that of other claimants. The nature of the claim under the judgment in ejectment must depend upon the issues litigated therein; and, as it is conceded the judgment was based upon a title alleged to have been derived from the state under its revenue laws, it is manifest that there was not a mere succession to the interest of the Wrights, as in case of an action founded on a conveyance by them, or on a sheriff's deed upon a money judgment recovered against them. Even though the tax deed was void, a party in possession thereunder in good faith claims by an independent title, and may not be dispossessed under a writ of assistance: *Exum v. Baker*, 115 N. C. 242, 44 Am. St. Rep. 449, 20 S. E. 448.

797 It is claimed, however, that Scott acquired whatever interest he may have in the land pending the foreclosure suit, and subject to such decree as might afterward be rendered therein. Had he taken under or in privity with any of the parties to the suit, that would be the result, undoubtedly: *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559, 52 N. W. 563; *Clark v. Charles*, 55 Neb. 202, 75 N. W. 563. But we have seen that he does not stand in such a position. The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting the relief sought: *Bellamy v. Sabine*, 1 De Gex & J. (Eng.) 566, 584; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *McClaskey v. Barr*, 48 Fed. 130; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155. In *Bellamy v. Sabine*, 1 De Gex & J. 578, which is the leading case upon this subject, Lord Cranworth said that the basis of the rule was the principle that "the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." In *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566, Chancellor Kent said: "Without it, as has been observed in some of the cases, a man, upon the service of a subpoena, might alienate his lands and prevent the justice of the court. Its decrees might be wholly evaded." The scope of

the rule is determined by its end and purpose. Hence it has no application to independent titles, not derived from any of the parties to the suit nor in succession to them: *Irving v. Cunningham*, 77 Cal. 52, 18 Pac. 878; 2 *Pomeroy's Equity Jurisprudence*, sec. 637. The rulings to the effect that one taking under execution on a money judgment against one of the parties to a pending suit holds subject to the decree, in no way conflict with this principle. Such a person succeeds to the title of the execution debtor, and takes only what the latter had, subject to all claims which existed against it in his hands of which he can be charged with notice. But where an independent title is acquired from another source, such fact does not ⁷⁹⁸ operate to prevent the court from granting the relief sought in the pending cause. That relief consists in subjecting the title of some of the parties to some claim or lien or equity. To whomsoever that title passes pending suit, the relief may still be granted against it. No relief is sought, however, and none is obtainable, in that suit against independent titles not derived from or dependent upon those of any parties to the suit. Dealings in these titles pendente lite cannot operate prejudicially to the power of the court or the rights of the litigants. In this state, if the owners of land subject to a tax lien are unknown, the holder of the lien may proceed in rem against the land. In such case any interest acquired in the land from any source pending suit would interfere therewith, and hence must be subject to the decree therein. But if the owners are known, the remedy is to foreclose by an ordinary suit, and subject the interest of such owners to satisfaction of the lien. In such case the scope of the *lis pendens* rule must be confined to the interests and estates sought to be subjected, and cannot extend to independent and adverse titles. Counsel contends that section 85 of the Code of Civil Procedure is broader than the general rule, and must constrain us to extend it so as to include all interests acquired by third persons pending suit, whatever their nature or source. While the language of that section, "no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title," is very broad, we are satisfied that it should be construed with reference to the pre-existing equity rule, which it evidently intended to adopt, and the obvious reason and principle behind it. To hold that no one could acquire rights by adverse possession or under tax sales pending a protracted litigation by creditors' bill or suit to quiet title would be most unfortunate in its results.

We therefore recommend that the order appealed from be reversed and the application for the writ of assistance dismissed.

Barnes and Oldham, CC., concur.

⁷⁹⁹ By the COURT. For the reasons stated in the foregoing opinion, the order of the district court is reversed and the application for a writ of assistance is dismissed.

When a Writ of Assistance will issue is discussed in the monographic notes to *Clay v. Hammond*, 98 Am. St. Rep. 159-165, and *Wilson v. Polk*, 51 Am. Dec. 152-158. A purchaser at a tax sale, not claiming title through or under a mortgagor, mortgagee, or his assignee, and not a party to a proceeding to foreclose the mortgage, is not in privity with them, and a writ of assistance will not issue against him at the instance of the purchaser at the foreclosure sale: *Exum v. Baker*, 115 N. C. 242, 44 Am. St. Rep. 449, 20 S. E. 448.

The Law of Lis Pendens is the subject of a monographic note to *Stout v. Phillippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878. For subsequent decisions on this subject, see *Goff v. McLain*, 48 W. Va. 445, 86 Am. St. Rep. 64, 37 S. E. 566; *Olson v. Leibpke*, 110 Iowa. 594, 80 Am. St. Rep. 327, 81 N. W. 801; *Ruth v. Wells*, 13 S. Dak. 482, 79 Am. St. Rep. 902, 83 N. W. 568; *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388. The general rule is that *lis pendens* is notice to those only who attempt to acquire some interest in the subject matter of a litigation after suit is begun, and from a party thereto: *Noyes v. Crawford*, 118 Iowa, 15, 96 Am. St. Rep. 363, 91 N. W. 799.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

MECHANICKS NATIONAL BANK v. COMINS.

[72 N. H. 12, 55 Atl. 191.]

INSURANCE, LIFE—Insurable Interest.—Insurance procured by one person upon the life of another in which he has no insurable interest, is against public policy and void as a wager contract. (p. 651.)

INSURANCE, LIFE—Insurable Interest.—Any reasonable expectation of pecuniary benefit or advantage, either directly or indirectly, from the continued life of another, creates an insurable interest in such life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity. (pp. 651, 652.)

INSURANCE, LIFE—Insurable Interest.—Insurance upon the life of the manager of a corporation, procured by one who furnishes funds to carry on the business, is not void for want of an insurable interest. (p. 653.)

INSURANCE, LIFE—Insurable Interest—Assignment.—A policy of life insurance valid in its inception may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide and not a device to evade the law against wager policies. (p. 656.)

INSURANCE, LIFE—Waiver of Conditions—Assignment.—A provision in a policy of life insurance that any claim thereunder by an assignee shall be subject to satisfactory proof of interest in the life of the insured is for the protection of the insurer, and waived by a formal admission of liability and payment of the money due into court, and is not available to one who asserts a claim to the proceeds of the policy adversely to an assignee thereof. (p. 653.)

SURETYSHIP—Discharge of Security.—If a person pledges his property as security for the performance of the contract of a third person, the property stands in the position of a surety, and any change in the contract which would have discharged a surety upon the contract will discharge the property pledged as security. (p. 658.)

Streeter & Hollis, for the plaintiffs.

G. M. Fletcher and Sargent, Niles & Morrill, for the defendants.

¹⁴ REMICK, J. The fundamental contention of the defendant is that the assignment was against public policy and void, because the plaintiffs to whom it was made had no insurable interest in the life of George T. Comins, the subject of the policy assigned.

¹⁵ It is, indeed, firmly established that insurance procured by one person upon the life of another, the former having no insurable interest in the latter, is void as a wager contract, against public policy, which condemns gambling speculations upon human life. And the defendant contends that a policy can no more be assigned than originally issued to a person having no insurable interest. To this contention the plaintiffs reply: 1. That they had an insurable interest in the life of George T. Comins at the date of the assignment by reason of being a heavy creditor of the George T. Comins Company, of which George T. Comins was the manager; 2. That the policy having been originally issued to George T. Comins under such circumstances as to constitute it a good and valid contract of insurance as against the world, its subsequent assignment to them in the regular course of business was valid, whether they had an insurable interest in the life of George or not.

1. Did the plaintiffs have an insurable interest? "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. . . . But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured": Warnock v. Davis, 104 U. S. 775, 779, 26 L. ed. 924; Adams v. Reed, 18 Ky. Law Rep. 858, 38 S. W. 420, 421, 35 L. R. A. 692. "It may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life": Connecticut etc. Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251. "It is not necessary . . . that the one for whose benefit the life of another is insured should be a creditor of that other. It is enough that in the ordinary course of events loss and disadvantage will naturally and probably arise to the party in whose favor the policy is written, from the death of

the person whose life is insured": Hoyt v. Insurance Co., 3 Bosw. 440, 446; Kentucky Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42. "The interest need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life": Trenton etc. Ins. Co. v. Johnson, 24 N. J. L. 576, 586. The tendency of the American decisions "is to hold that wherever there is any well-founded expectation of or claim to any advantage to be derived from the continuance of a life, there is an insurable interest in the life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity": Bliss on Life Insurance, secs. 21-31; May on Insurance, secs. 102-111. "A ¹⁶ person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remaining alive, or lose by his death": 3 Kent's Commentaries, 14th ed., 566, note. The result of a recent review of the American cases is thus stated: "An insurable interest which will take an insurance policy out of the class of wager policies is such an interest arising from ties of blood or other relations as will justify a reasonable expectation of advantage or benefit from a continuance of the life of the assured. This rule, it would appear, does not dispense entirely with a pecuniary interest, but merely permits that interest to consist of a mere expectation of pecuniary benefit, as distinguished from the requirement of the other rule, that the interest must amount to a claim recognizable or enforceable in law": 54 L. R. A. 234, note. In short, "the essential thing is that the policy shall be obtained in good faith and not for the purpose of speculating upon the hazards of a life": Connecticut etc. Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. ed. 251; Kentucky Ins. Co. v. Hamilton, 63 Fed. 93, 101, 11 C. C. A. 42; Loomis v. Eagle etc. Ins. Co., 6 Gray, 396.

If, as the plaintiffs concede, there is no case in point with the one at bar, the foregoing quotations from so many different sources of the highest authority leave no doubt as to the general principle governing it. In accordance with this principle, it is held that a partner has an insurable interest in the life of his copartner, upon whose co-operation he relies for the success of the business: Connecticut etc. Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. Rep. 949, 27 L. ed. 800; Morrell v. Trenton etc. Ins. Co., 10 Cush. 282, 57 Am. Dec. 92; Valton v. National Fund etc. Co., 20 N. Y. 32; Powell v. Dewey, 123 N.

C. 103, 68 Am. St. Rep. 818, 31 S. E. 381, 18 Cent. L. J. 347. So when one furnishes the capital and outfit for a mining expedition, it is held that he has an insurable interest in the life of him to whom he commits the management and success of the enterprise. It is hardly necessary to say that the success of a corporate enterprise may be so interwoven with the personality of its manager that its stock is taken, and money is loaned to carry it on, as much in reliance upon that personality as upon the intrinsic merit of the enterprise; and no good reason appears why a stockholder or creditor, the value of whose investment may be reasonably said to depend upon the life or health of the man at the helm, should not have an insurable interest in his life, the same as one who invests money in a partnership, relying upon the skill or experience of his copartner, has an insurable interest in the life of the latter, or one who equips a mining expedition has an insurable interest in the life of him to whom its management is committed. The creditor or stockholder under such circumstances would seem to have that "reasonable expectation of pecuniary benefit or profit from the continuance of another's life," ¹⁷ which is held sufficient to constitute an insurable interest. In such case "the essential thing . . . that the policy should be obtained in good faith and not for the purpose of speculating upon the hazards of life," would appear to be present. In this view we are not prepared to say as matter of law (*Wainwright v. Bland*, 1 Moody & R. 481; *Swick v. Home Ins. Co.*, 2 Dill. 160, Fed. Cas. No. 13,692, 2 Ins. L. J. 415; *Langdon v. Union etc. Ins. Co.*, 14 Fed. 272, 274, 275; *Steinback v. Diepenbrock*, 158 N. Y. 24, 31, 32, 70 Am. St. Rep. 424, 52 N. E. 662, 44 L. R. A. 417) that the plaintiffs, who were furnishing the funds to carry on the business of the George T. Comins Company had no insurable interest in the life of George T. Comins, the manager and apparently the originating and directing personality in the enterprise.

2. But assuming that the plaintiffs had no such insurable interest in George T. Comins as would entitle them to take out a policy on his life, it does not follow that a policy previously taken out by George T. Comins upon his own life, with no objectionable purpose, but under the full sanction of the law, could not afterward be assigned by him to the plaintiffs, with the consent of the beneficiary, for a sufficient consideration and bona fide object.

In Elliot on Insurance (1902), the latest treatise upon the subject, the state of the law is thus declared (section 62): "The question whether a policy valid at its inception may afterward, before the death of the insured, be assigned to one who has no insurable interest in the life of the insured, has been much discussed, and the authorities are in hopeless conflict." "The tendency in business life has been to liberalize the rules governing life insurance and thus to broaden its scope. It was found desirable that life insurance policies should pass freely by transfer and assignment; and so long as this was with the consent of the parties, it was felt that the objections on the ground of public policy were largely illusory. Thus a more liberal rule has been adopted in many states, where it is held that a policy supported by an interest in its inception is a mere chose in action, which may be assigned to a person who has no insurable interest in the life. Such assignment does not create a new contract, but merely continues the old contract in force. A person may thus insure his own life, and either name or assign the policy to whomsoever he chooses, without reference to the interest of such beneficiary in his life. The rule that the assignee of a valid policy need not have an insurable interest in the life prevails in California, Colorado, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, New York, Ohio, Rhode Island, Vermont, Wisconsin, South Carolina and in England and Canada. The doctrine seems to be supported by the weight of authority, but it must be noted that, under either rule, the essential fact is that the transaction must be bona fide, and not a mere ¹⁸ cover for a wagering or speculative insurance, or a device to evade the law. In fact, many of the cases which hold an assignment without interest void will, upon close examination, be found to rest upon the fact that the transaction in question was merely colorable, and an attempt to obtain speculative insurance": Elliot on Insurance (1902), sec. 63. "There seems to be a clear distinction between cases in which the policy is procured by the insured bona fide of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termination, and to allow some one else to do it at their will. The true line is in the activity and responsibility of the assured, and not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life, payable to any person he pleases; and it is drawing a distinction without a difference to hold that he cannot

take out a policy and afterward transfer its benefits": May on Insurance, 4th ed., sec. 398A.

"It is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of life and may repeat the act ad libitum, and quite another thing to say that he may purchase the policy as a matter of business after it has once been duly issued under the sanction of the law, and is therefore an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality and no imminent peril to human life": Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496. "It is said that if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned under such circumstances would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and assignment together, as forming part of one transaction. . . . The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance, to persons not interested in the continuance of the life of the assured, seems to be that those asserting non-assignability proceed on the assumption that the question is one of law, and that if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily ¹⁹ valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved; and if it then appears that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contracts invalid, not because of the assignment, but in spite of it: 'Steinback v. Diepenbrock, 158 N. Y. 24, 31, 32, 70 Am. St. Rep. 424, 52 N. E. 662, 44 L. R. A. 417; Swick v. Home Ins. Co., 2 Dill. 160, Fed. Cas. No. 13,692, 2 Ins. L. J. 415; Langdon v. Union etc. Ins. Co.,

14 Fed. 272; *Wainwright v. Bland*, 1 Moody & R. 481. See, also, notes, 57 Am. Dec. 103, 52 Am. Rep. 143; 58 Am. Rep. 855; 16 Am. St. Rep. 906; 17 Am. Law Reg. 86.

We think both reason and authority sustain the conclusion that a life policy of insurance, valid in its inception, may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide and not a device to evade the law against wager policies: *Fairchild v. Association*, 51 Vt. 613; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116, 132, 133, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411; *Steinback v. Diepenbrock*, 158 N. Y. 24, 29, 30, 31, 32, 70 Am. St. Rep. 424, 52 N. E. 662, 44 L. R. A. 417; *Rittler v. Smith*, 70 Md. 261, 265-269, 16 Atl. 890, 2 L. R. A. 844; *Crosswell v. Connecticut etc. Assn.*, 51 S. C. 103, 105, 109, 28 S. E. 200; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290. Authorities might be multiplied, but as they are fully collected on both sides of the question in the foregoing cases and notes, it would be useless to do so.

The defendant relies upon *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, and *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981. Speaking of the former case, and of the earlier case of *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244, the supreme court of Massachusetts, in *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 32, 52 Am. Rep. 245, said they "were both cases in which the policies were taken out by the procurement of the assignees, in order that they might be assigned to them, under such circumstances as that they will be held to be in evasion of the law prohibiting gaming policies. The remark of Mr. Justice Field in the latter case, that 'the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name,' was not necessary to the decision." The supreme court of Connecticut has also said, referring to *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. ed. 924: "The expressions to the effect that the law permits a transfer only to a person who has an insurable interest in the life insured, were doubtlessly occasioned by the belief that the contract under consideration was a wager": *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116, 133, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411. That they were not intended to declare that a policy valid in its inception could not, under any circumstances, be transferred to one having no insurable inter-

est, would ²⁰ seem clear from the later expressions of the same judge in *New York etc. Ins. Co. v. Armstrong*, 117 U. S. 591, 597, 6 Sup. Ct. Rep. 877, 880, 29 L. ed. 997, where he said: "A policy of life insurance, without restrictive words, is assignable by the insured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies." The earlier decisions of the same tribunal are as inconsistent as this later one with the view of *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, contended for by the defendant. Thus, in *Connecticut etc. Ins. Co. v. Schaefer*, 94 U. S. 457, 462, 24 L. ed. 251, the court said: "But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained." The headnote is: "Any person has a right to procure an insurance on his own life, and assign it to another, provided it be not done by way of cover for a wager policy." In *Aetna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287, the court said: "As held by us in the case of *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 462, 24 L. ed. 251, . . . any person has a right to procure an insurance on his own life and assign it to another, provided it be not done by way of cover for a wager policy." *Warnock v. Davis* is reviewed and distinguished, and the conclusion is reached in the present case ably sustained, in *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116, 132, 133, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411, *Steinback v. Diepenbrock*, 158 N. Y. 24, 31, 32, 70 Am. St. Rep. 424, 52 N. E. 662, 44 L. R. A. 417, *Rittler v. Smith*, 70 Md. 261, 265, 266, 267, 16 Atl. 890, 2 L. R. A. 844, and *Croswell v. Connecticut etc. Assn.*, 51 S. C. 103, 105-109, 28 S. E. 200.

In *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, the court said: "The transaction in a legal aspect does not differ from what it would have been if he [the beneficiary] had himself procured the insurance with Mrs. Lawrence's [the subject of insurance] assent." Thus the policy was treated as a wager contract in its inception. The case therefore, is no more an authority than *Warnock v. Davis*, for the proposition for which the defendants contend here, but is entirely consistent with the conclusion reached in the present case.

American Legion of Honor v. Sides, 67 N. H. 595, 39 Atl. 1112, was not a case of assignment. The policy there in ques-

tion was payable to the defendant when issued, and the premiums were paid by him. The court evidently proceeded upon the idea, as in *Lanouette v. Leplante*, 67 N. H. 118, 36 Atl. 981, and *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, that "the transaction in a legal aspect did not differ from what it would have been if the defendant had himself procured the insurance," and that it was a wager contract in its inception. The fact that the case was disposed of without comment, upon the authority of *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, ²¹ confirms this view. Like *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, and *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, it is distinguishable from the present case.

3. The provisions in the policy regarding assignment, upon which the defendant relies, were inserted for the protection of the company. The company has waived them by admitting liability and paying the money into court. They are not available to the defendant: *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768.

4. But assuming the validity of the assignment, the defendant contends that, as it was made as a pledge or security for the debt of another, its legal relation was that of a surety, and that it was discharged by certain transactions between the plaintiffs and the principal debtor changing the terms of the contract, to which the policy was collateral, and the status of security, to which the defendant, in case he paid the principal indebtedness, would have been entitled to subrogation.

Of the soundness of the legal proposition, that "when a person pledges his property as security for the performance of the contract of a third party, the property stands in the position of a surety, and any change in the contract which would have discharged a surety upon the contract will discharge the property pledged as security," there would seem to be no doubt: *Brandt on Guaranty and Suretyship*, 2d ed., sec. 34; *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1; *Price v. Dime Savings Bank*, 124 Ill. 317, 7 Am. St. Rep. 367, 15 N. E. 754. The trouble is not with the law of the defendant's position in this respect, but with the facts. As we understand the finding of the court, the defendant assented to the transaction of December 1, 1892, and that the policy should remain with the plaintiffs as security for the notes then substituted. The facts reported are quite sufficient to warrant this finding. Having so assented, it is hardly necessary to say that the defendant is now estopped to claim a discharge on account of that transaction: *Crosby v. Wyatt*, 10

N. H. 318, 324; *Watriss v. Pierce*, 32 N. H. 560; *Hutchinson v. Wright*, 61 N. H. 108; *Brandt on Guaranty and Suretyship*, 2d ed., sec. 342. Furthermore according to the case as amended, the transaction of 1892 involved no extension.

As we understand the finding of the court, the transaction of November, 1894, was neither a payment nor an extension of the principal indebtedness, nor a change in the status of any security held by the plaintiffs to which the defendant would have been entitled to be subrogated had he paid the principal debt, except such change as resulted from the bona fide foreclosure of the plaintiff's mortgages and due application of the proceeds in reduction of the primary obligations. No other interpretation would be consistent with the decree. If we have misinterpreted the finding of the court, and the foreclosure was in fact only a matter of form,²² and the real transaction was a transfer of the property of the Comins Company to the Beecher's Falls Company, pursuant to a binding agreement between the plaintiffs and the Comins Company that the plaintiffs would thereafter look for their pay to the Beecher's Falls Company and not to the Comins Company, then there would appear to have been such a modification of the terms of the contract, for the performance of which the policy was pledged, as to effect a discharge of the policy as security.

5. The mortgage sale "and the amount of the proceeds of each sale (five thousand dollars and eighteen thousand dollars), were shown by the record," and, upon such showing, were found as facts. The sale and the proceeds thereof already appearing as "facts" from the record, and the application of the proceeds to the mortgage indebtedness following as matter of law, the admission of the indorsement upon the wrapper, merely evidencing the same facts, was not reversible error, especially in the absence of anything in the case showing or indicating a claim that in these respects the facts were otherwise than as shown by the record: *Wiggin v. Damrell*, 4 N. H. 69; *Foye v. Leighton*, 24 N. H. 29, 37, 38; *Wait v. Nashua etc. Assn.*, 66 N. H. 581, 49 Am. St. Rep. 630, 23 Atl. 77, 14 L. R. A. 356.

Exceptions overruled.

Chase and Walker, JJ., did not sit; the others concurred.

An Insurable Interest in the life of another must, it is said, be a pecuniary interest: Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772. Kinship, however, is not necessary: *Carpenter v. United States etc. Ins. Co.*, 161 Pa. St. 9, 41 Am.

St. Rep. 880, 28 Atl. 943, 23 L. R. A. 571. A creditor has an insurable interest in the life of his debtor: *Insurance Co. v. Duncomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, 69 S. W. 345, 58 L. R. A. 694. And a partner may have an insurable interest in the life of his copartner: *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274. Compare *Powell v. Dewey*, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381. But a building association has no insurable interest in the life of a member not indebted to it: *Tate v. Commercial Bldg. Assn.*, 97 Va. 74, 75 Am. St. Rep. 770, 33 S. E. 382, 45 L. R. A. 243. A woman has an insurable interest in the life of a man whom she is under contract to marry: *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004, 95 N. W. 948.

A Life Insurance Policy may be Assigned, according to many authorities, to one without any insurable interest in the life of the insured. Other authorities regard such assignments invalid: See the monographic note to *Chamberlain v. Butler*, 87 Am. St. Rep. 506, 508.

MURRAY v. BOSTON AND MAINE RAILROAD.

[72 N. H. 32, 54 Atl. 289.]

EVIDENCE—Res Gestae.—Declarations or statements made by a person immediately after the injury is inflicted upon him, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, are admissible as part of the *res gestae*. (p. 664.)

EVIDENCE—Res Gestae.—Declarations by an injured person as to the cause of the accident, made immediately thereafter, cannot be excluded as part of the *res gestae* on the ground that they are in the form of a narrative, and made in answer to a question. (p. 666.)

MASTER AND SERVANT—Assumption of Risk.—A railroad employé does not assume the risk of accident from proximity of a jigger-stand to a switch when he has no knowledge of it, and is not chargeable with such knowledge in the exercise of ordinary care in the performance of his duties. (p. 667.)

NEGLIGENCE—Accident—Evidence.—The manner of the occurrence of an accident, as disclosed by the evidence, may warrant an inference in favor of the person injured, that he had no knowledge of a defective appliance which caused the accident. (p. 667.)

MASTER AND SERVANT—Assumption of Risk.—Knowledge by a brakeman of a jigger-stand in close proximity to a switch is not shown by the fact that he has been over the railroad a number of times within a short period before the accident, when such stand is not so conspicuous as to necessarily attract his notice, and men who have worked with him during that time have not noticed it. (pp. 668, 669.)

MASTER AND SERVANT—Assumption of Risk.—The fact that jigger-stands are frequently placed along railroad tracks does not charge a railroad employé with notice that one may be near a switch, when they usually lead into carhouses and are not generally placed near switches. (p. 669.)

MASTER AND SERVANT—Negligence.—Direct Evidence is not necessary to show due care on the part of an employé at the time of an accident and injury to him. The fact that he is in the exercise of due care may be inferred from circumstances, if there is no evidence of his negligence. (p. 669.)

Doyle & Lucier, for the plaintiff.

Burns & Burns and Hamblett & Spring, for the defendants.

³³ WALKER, J. It is claimed that Baker's statement made directly after the infliction of his injury was not admissible. If the declaration was merely a narrative of a past event, the evidence of it would be inadmissible, upon the ground that ordinarily hearsay evidence is not received in proof of the truth of an assertion. The uniform practice of the courts in common-law jurisdictions has resulted in the establishment of this principle, as a necessary and useful rule in the investigation of questions of fact. But when the declaration of one not a sworn witness upon the trial is something more than mere narrative—when its probative force is derived in part, at least, from sources other than the credibility of the declarant—an ³⁴ opportunity is afforded for the argument that it does not fall within the strict rule against hearsay evidence, or that it constitutes an exception to the rule. It is then possible to say that the declaration, while verbally a mere narrative, is something more, and may be, for that reason, of such probative force as to be admissible as evidence upon a material issue. It may be so connected with other controverted facts as to be itself a fact or circumstance naturally growing out of and in some sense attested by them. The verbal statement of a person made under some circumstances may be a part of the actual occurrence, and be entitled to as much weight as evidence as any other part of the transaction. This is the principle, it is believed, that is involved in the somewhat obscure doctrine of *res gestae*, which is often resorted to, apparently, more on account of its convenient indefiniteness than for its scientific precision. But the principle, whether expressed in an abbreviated Latin phrase or otherwise, is an important one in any system of evidence whose object is the ascertainment of facts. Its development has been promoted, in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The ques-

tion is not now, how little, but how much, logically competent proof is admissible.

In cases of this character, it is important to ascertain what, if any, relevancy the declaration has; in other words, what it tends to prove; for unless its natural effect is to prove or explain a point in issue or a controverted fact, it is not admissible. In this case the burden was upon the plaintiff to establish by a balance of the probabilities that his intestate received his injury in consequence of the negligence of the defendant. This, in a broad general sense, was the issue tried; but it involved a material inquiry as to the manner in which the accident happened. If it is assumed that suffering the planks to be where it is admitted they were was a negligent act of the defendant, it was important for the plaintiff to show that they were the proximate or effective cause of the accident. If in the exercise of due care the deceased would not have received the injury complained of but for the existence of the planks at that particular place and time, the plaintiff would have sustained the burden assumed by him. On the other hand, if the cause of the accident was something other than the planks, as manifestly might have been the case, his failure in this respect might have been fatal: *Nashua Iron etc. Co. v. Worcester etc. R. R. Co.*, 62 N. H. 159. The controversy was whether the planks caused the deceased to stumble and fall, and thus to suffer the injury inflicted upon him by the car wheel running over his legs. The plaintiff's evidence ³⁵ was that the deceased was found almost immediately after the accident lying between the planks, with his legs practically severed from his body; that the fragments of his broken lantern were on the ground near him; and that blood and bits of flesh were found upon the car wheel and near the planks. These are all physical facts which as evidence afford some information as to how the accident happened. They are relevant details or results of the main fact. In the strictest sense, they may not together constitute or fully evidence the fact in controversy; but in law they are said to be a part of it. The admission of evidence of this character is placed upon the ground that it discloses to the jury the facts and circumstances which attended the principal fact; in a not inappropriate sense, they are a part of the *res gestae*, and exist as evidence of it: *Willis v. Quimby*, 31 N. H. 485; *Tucker v. Peaslee*, 36 N. H. 167, 181; *Wyman v. Perkins*, 39 N. H. 218; *Willey v. Portsmouth*, 64 N. H. 214, 219, 9 Atl. 220.

When, instead of attendant physical facts and circumstances, the evidence consists of a declaration, made by a person at the time of the event or transaction which is under investigation, its admission depends upon a similar principle. If its materiality or relevancy is conceded, the question whether it is a part of the *res gestae* arises; that is, whether it occurred in such intimate connection with the event in issue as to constitute it in a reasonable and proper sense a part thereof. If it does, it is in its probative bearing superior to mere hearsay remarks, and may for that reason be admissible. "Its connection with the act gives the declaration greater importance than what is due to the mere assertion of a fact by a stranger, or a declaration by the party himself at another time. It is part of the transaction, and may be given in evidence in the same manner as any other fact": *Hadley v. Carter*, 8 N. H. 40, 43. "Where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as a part of the *res gestae*": *Sessions v. Little*, 9 N. H. 271, 276.

After approving the statement quoted above from *Hadley v. Carter*, 8 N. H. 40, 43, the court in *Wiggin v. Plumer*, 31 N. H. 251, 267, state the principle as follows: "When a fact is offered in evidence, the whole transaction, if it consists of many particulars, may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence, may neutralize it, or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury. ³⁶ . . . Contemporaneous, but otherwise unconnected, conversation is rejected, on the same ground as other unconnected facts. If the statement offered in evidence does not tend to elucidate or give character to the acts proved, it is to be rejected. If it is upon the same subject and relative to the act in proof, it should be received": See, also, to the same effect, *Mahurin v. Bellows*, 14 N. H. 209, 212; *Tenney v. Evans*, 14 N. H. 343, 350, 40 Am. Dec. 194; *Morrill v. Foster*, 32 N. H. 358.

But while admitting that the foregoing statements of the law are substantially correct, the defendant insists that a declaration of the character received in this case, in order to be admissible, must have been strictly and literally contemporaneous

with the fact it was intended to elucidate or explain. In other words, it is in effect conceded that if, while the car wheels were passing over Baker's legs, he had exclaimed, "I fell over these old planks," that statement would have been admissible as a part of the *res gestae*; but it is claimed that, although made within two minutes after the actual infliction of the injury, while he was lying between the planks groaning on account of the pain, and while no substantial change had occurred in the attendant circumstances, it is not admissible, because the accident was then a past event and the statement a mere narrative. But this technical refinement is not based upon a reasonable view of the principle involved. No satisfactory reason is assigned for the distinction suggested. If the statement of a party made while a serious injury is being inflicted upon him is regarded as an evidentiary fact throwing light upon the manner of the occurrence, why does not the same statement made immediately after the principal event, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, constitute an equally admissible part of the proof? Why may it not be as much a part of the *res gestae* as the fact that the declarant is found at the same time lying in a place and position indicating the manner of the accident? His position as well as his declaration may be to some extent subject to his volition. If the very short period of two minutes after a man's legs have been severed from his body in a railroad accident prevents his declaration then made from being deemed a part of the transaction, it is difficult to understand why his position, which may be as much subject to his intelligent control during that brief and trying interval of time as his power of verbal communication, should be regarded as a competent evidentiary fact explaining the manner of the accident. The fact is, that both his declaration and his position may be under the circumstances credible and admissible evidence, for very similar reasons; and that to exclude the evidence in the one case, because it may be fabricated, ³⁷ would furnish a reason for its exclusion in the other. The possibility of its being unreliable would seem to relate to the weight, rather than to the admissibility, of the evidence. That the doctrine of exact coincidence in such cases is not followed in this state, is plainly indicated in *Caverno v. Jones*, 61 N. H. 623, 624, in which it was decided that, in trespass for assault and battery, threats to do the plaintiff bodily harm, made

by the defendant so soon after the alleged assault as to constitute a part of the transaction, are competent. Nor do any of the decisions in this jurisdiction warrant the assumption that the defendant's theory has been adopted here. See cases above cited.

Cases in other states and in England, it must be admitted, are not in accord. Some adopt an unreasonably strict construction of the rule (*Regina v. Bedingfield*, 14 Cox C. C. 341; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Eastman v. Boston etc. R. R. Co.*, 165 Mass. 342, 43 N. E. 115; *Louisville etc. R. R. Co. v. Pearson*, 97 Ala. 211, 215, 12 South. 176; *Cleveland etc. R. R. Co. v. Mara*, 26 Ohio St. 185); others admit statements only remotely connected with the principal fact (*Insurance Co. v. Mosly*, 8 Wall. 397, 19 L. ed. 437; *Commonwealth v. M'Pike*, 3 Cush. 181, 50 Am. Dec. 727; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297); while others adopt what seems to be the more rational view, as stated in *Commonwealth v. Hackett*, 2 Allen, 136, 140, that statements are admissible when "it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact": *Rawson v. Haigh*, 2 Bing. 99; *Rouch v. Great Western R. Co.*, 1 Q. B. 51; *Regina v. Lunny*, 6 Cox C. C. 477; *Waldele v. New York Cent. etc. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41; *Martin v. New York etc. R. R. Co.*, 103 N. Y. 626, 9 N. E. 505; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118; *Mayes v. State*, 64 Miss. 329, 1 South. 733, 60 Am. Rep. 58; *Pittsburg etc. Ry. Co. v. Wright*, 80 Ind. 182; *Wood v. State*, 92 Ind. 269; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Chicago etc. Ry. Co. v. Becker*, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; *Lambert v. People*, 29 Mich. 71; *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; *People v. O'Brien*, 92 Mich. 17, 52 N. W. 84; *Christianson v. Pioneer Furniture Co.*, 92 Wis. 649, 66 N. W. 699; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *Fish v. Illinois Cent. Ry. Co.*, 96 Iowa, 702, 65 N. W. 995; *State v. Rider*, 95 Mo. 474, 8 S. W. 723; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49. See, also, Professor Thayer's article on *Bedingfield's Case*, 14 Am. Law. Rev. 817, 15 Am. Law Rev. 71.

The seriousness of the injury, the character of the accident, and the surrounding physical circumstances and results of the occurrence, attending the declaration as well as the principal fact, are necessary matters for consideration in the determination of the question of the admissibility of the declaration. When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically ³⁹ it may be said, the act speaks through him and discloses its character. It is as if it were a part of the act itself. This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it, and that it should be admitted like any other material fact or evidentiary detail. If this principle of evidence may be difficult of application in practice, its soundness is not thereby weakened. A discriminating observance of it will promote the successful discovery of truth, which, without its aid, is often involved in great obscurity.

It is not contended that Baker's statement was not relevant, or that it did not tend to show how the accident happened; that is, the proximate cause of it. It was not mere hearsay, depending alone for its truthfulness upon the credibility of an unsworn witness. It was directly connected in point of time with the main fact, and was made while Baker was in the place where the force of the collision presumably threw him, and in view of all the surrounding physical facts connected with his misfortune. It cannot be said, therefore, as a matter of law, that his remark did not derive credit from the occurrence with which it was so intimately connected, or that it was not in a reasonable sense a part thereof and admissible in evidence. Although in form it was a narrative, it could not be excluded for that reason alone, if in other respects it was competent. Nor does the fact that it was made in answer to the witness' question deprive it of its character as a part of the *res gestae*: *Fish v. Illinois Cent. Ry. Co.*, 96 Iowa, 702, 707, 65 N. W. 995; *Crookham v. State*, 5 W. Va. 510. To exclude it "would be practically to say that no declaration or statement, however near to the principal fact, or however important and material as giving to it color and significance, could ever be admitted in proof": *Commonwealth v. Hackett*, 2 Allen, 140. How

far the question of the admissibility of such testimony may be determined by the trial court as a matter of discretion, it is unnecessary in this case to decide; for the exception to its admission presents no error. In *Commonwealth v. M'Pike*, 3 Cush. 181, 184, 50 Am. Dec. 727, it is said that "in the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding justice"; while the contrary of that proposition seems to be maintained in *Lund v. Tyngsborough*, 9 Cush. 36, 41.

The defendant insists that the motion for a nonsuit should have been granted, because Baker must be held to have assumed the risk in consequence of which he was injured. This contention in effect concedes that the defendant was negligent in permitting a ³⁰ jigger-stand to be where this one was, and that it was an operating cause of the accident; but it is claimed the plaintiff cannot recover, for the reason that the danger incurred was one of the incidents of his intestate's employment. If the latter did not know of the existence of the jigger-stand near the switch which he was about to operate, or if, in the exercise of ordinary care in the performance of his duties, he was not chargeable with such knowledge, he cannot be held responsible for consequences resulting from his failure to take such precautions for his safety as a knowledge of the danger would have suggested to a man of ordinary prudence; otherwise he is precluded by the doctrine of the assumption of risk. "The plaintiff was bound to prove that the special danger causing the injury was not known to [Baker], and in the exercise of ordinary care by him would not have come to his knowledge": *Burnham v. Concord etc. R. R. Co.*, 68 N. H. 567, 44 Atl. 750.

If the fact that the accident happened is not alone sufficient evidence of the injured party's want of knowledge of the existence of the defective appliance causing it, or of his exercise of due care (*Huntress v. Boston etc. R. R. Co.*, 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154; *Gahagan v. Boston etc. R. R. Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Boston etc. R. R. Co.*, 71 N. H. 362, 52 Atl. 443), the manner of its occurrence, when that is in part disclosed by the evidence, may warrant an inference in his favor upon these points. In this case the plaintiff's evidence (which, upon this motion, is to be taken as true) showed that it was Baker's duty to set the switch which was near the jigger-stand. This stand consisted of two planks, about fifteen feet long, placed at right

angles with the track. When nearly opposite this place, at about 2 o'clock in the morning, Baker, who was on a car, went down over the side of the car to set the switch. The night was a dark one. Very soon thereafter he made an outcry, the car wheels passed over his legs, and he at once said he stumbled over the planks. His position immediately after the accident, the blood on the rail between the planks, as one witness testified, the pieces of his broken lantern near him, corroborated and supported the statement that he stumbled over the planks. If he had known that there was a jigger-stand at that place, he would have known that some care was necessary to avoid falling over it in the performance of his work. It is hardly conceivable that he would have knowingly encountered that danger—that is, knowing the obstruction was directly in his way, he would have stumbled over it. The act of stumbling usually implies the existence of an object in a traveler's way of which he was at the time unconscious. It is no answer to say that Baker must have known of this obstruction because he had been over the road as a brakeman ten or twelve times within two months of the accident; for it appeared that men who worked with him during that time ⁴⁰ had not noticed it before the accident. It was not so conspicuous as necessarily to attract the attention of brakemen. It is at least apparent that fair-minded men might reasonably draw the inference from the evidence (*Hardy v. Boston etc. R. R. Co.*, 68 N. H. 523, 536, 41 Atl. 179; *Whitcher v. Boston etc. R. R. Co.*, 70 N. H. 242, 245, 46 Atl. 740) that Baker did not know that his approach to the switch lay over a jigger-stand.

But it is urged that he ought to have known it. His experience for many years as a freight brakeman must have afforded him the information that such stands are of frequent occurrence on the line of a railroad, and that they are necessary appliances at certain points for the use of the sectionmen. But while it appeared from the cross-examination of the plaintiff's witnesses that these appliances are numerous on lines of road on which Baker had worked, it also appeared that they are seldom placed near a switch and usually lead into carhouses, which would afford some notice of their existence. Upon the evidence, it might be found that a brakeman ought to know that in the vicinity of a carhouse there would in all probability be a jigger-stand; and that its existence near a switch and away from a carhouse was so unusual as to make it unreason-

able to say that a brakeman ought to anticipate such an arrangement at every switching point. It was not unreasonable for the jury to infer from the evidence that men of ordinary prudence in Baker's position, and possessing his knowledge of the means employed in the business of railroading, would not anticipate the existence of a jigger-stand at this particular point. If upon this subject fair-minded men might differ, the question should be submitted to the jury. It does not appear that Baker ought to have anticipated the peculiar obstruction which caused him to stumble.

The further contention is made that there is no evidence that Baker exercised reasonable care in the performance of his work at the time of the accident—a fact the plaintiff was bound to prove by competent evidence. But it is not necessary that the evidence should be direct; the fact may be inferred from circumstances; and, in the absence of direct proof, the question is whether the circumstances legitimately warrant an inference of the fact: *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602; *Burnham v. Concord R. R. Co.*, 69 N. H. 280, 282, 283, 45 Atl. 563. When Baker was last seen before the accident, he was getting down over the side of the car nearly opposite the switch, for the purpose, evidently, of setting the switch; he was attending to his duty. He had had extensive experience as a brakeman, and understood perfectly how to perform his work with reasonable safety under ordinary circumstances. The time that elapsed after his lantern disappeared over the side of the car until he cried out was very brief. What he was doing⁴¹ during that short space of time is not a mere matter of conjecture. It was competent for the jury to infer that he was proceeding to reach the switch in the way an experienced brakeman would adopt under the circumstances, and that such a way would be a reasonably prudent one—not the opposite. The evidence was sufficient to warrant that finding, in the absence of any evidence tending to show that he was negligent: *Hutchins v. Macomber*, 68 N. H. 473, 44 Atl. 602.

As there is no contention that the evidence did not warrant a finding of the defendant's negligence in permitting the jigger-stand to be near the switch in question, no error is apparent in the trial, and the verdict must stand.

Exception overruled.

Chase, J., was absent; the others concurred.

Declarations by One Injured in an accident, as to its cause, made at the place and within a few minutes after it occurred, are admissible as part of the *res gestae*: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; *Texas etc. Ry. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929, 17 S. W. 1041; *Savannah etc. Ry. Co. v. Holland*, 82 Ga. 257, 14 Am. St. Rep. 158, 10 S. E. 200; *Pennsylvania R. R. Co. v. Lyons*, 129 Pa. St. 113, 15 Am. St. Rep. 701, 18 Atl. 759; *Louisville etc. Ry. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. 453, 2 L. R. A. 520; *Little Rock etc. Ry. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50. But see *Chicago etc. Ry. Co. v. Becker*, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524; and consult the monographic note to *People v. Vernon*, 95 Am. Dec. 51-76; *Keefer v. Pacific Mut. Life Ins. Co.*, 201 Pa. St. 448, 88 Am. St. Rep. 822, 51 Atl. 366; *Honeycutt v. State*, 42 Tex. Cr. Rep. 129, 96 Am. St. Rep. 797, 57 S. W. 806; *Chapman v. State*, 43 Tex. Cr. Rep. 528, 96 Am. St. Rep. 874, 65 S. W. 1098.

The Doctrine of Assumption of Risks will be found discussed in the monographic notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 886-896; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 314-322.

HORAN v. BYRNES.

[72 N. H. 93, 54 Atl. 945.]

CONSTITUTIONAL LAW—Spite Fences.—A statute declaring that any structure in the nature of a fence unnecessarily exceeding five feet in height and erected for the purpose of annoying the owner or occupant of adjoining premises shall be deemed a private nuisance, and providing that an owner or occupant thereby injured in the comfort or enjoyment of his estate may maintain an action for the damages sustained, and designed to prohibit an unnecessary and unreasonable use of land by the owner thereof, is valid, and not an unconstitutional interference with the rights of private property. (pp. 678, 679.)

EVIDENCE—Witnesses—Failure to Deny Statement.—The fact that a witness did not deny a statement made in her presence at a former trial and attributed to her is incompetent as tending to establish the falsity of her testimony in denying such statement given at a subsequent trial. (p. 680.)

P. H. Sullivan, for the plaintiff.

Brown, Jones & Warren, for the defendant.

⁹⁴ PARSONS, C. J. "Any fence or other structure in the nature of a fence, unnecessarily exceeding five feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Any owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby.

"If the plaintiff recovers judgment in the action, the defendant shall cause the removal of the nuisance within thirty days from the date of the judgment, and for each day he shall permit the nuisance to remain after the expiration of said thirty days he shall incur a penalty of ten dollars for the use of the party injured": Pub. Stats., c. 143, secs. 28-30.

The act forbids the use by one land owner of his land for the unnecessary erection of a fence exceeding five feet in height, when the purpose of such unnecessary height is the annoyance of the adjoining owner or occupant, if such unnecessary height injures the adjoining owner in his comfort or the enjoyment of his estate. The claim of the defendant in support of his motion for a nonsuit, that the statute is unconstitutional, raises the question whether ⁹⁵ the statutory prohibition is an interference with the defendant's "natural, essential, and inherent" right of "acquiring, possessing, and protecting property," or deprives him of that protection in its enjoyment, which is the right of "every member of the community": Bill of Rights, arts. 2, 12.

"The structure here referred to is one designed to take the place of a fence in the ordinary meaning of the term—a structure erected upon or near the dividing line between adjoining owners for the purpose of separating the occupancy of their lands": *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25; *Spaulding v. Smith*, 162 Mass. 543, 39 N. E. 189. The correlative right and duty of adjoining owners and occupants of lands at the common boundary between them is matter of general and public concern. The existence or not of an obligation to fence, what should constitute performance, and what liabilities should follow from nonperformance, are matters as to which the establishment of a definite rule plainly promotes the public peace and comfort and the security of property rights in real estate. All these questions were early settled by the legislature. It prescribed the obligation to fence as between adjoining owners, provided a method for the enforcement of the duty, declared the legal liability for failure to fence, and defined a sufficient fence. There was legislation upon the subject in 1687, 1692, 1743, and 1792 (1 N. H. Prov. Laws, Batch. ed., 200; 3 Prov. Papers, 176; Laws 1696-1725, p. 117; Laws, ed. 1761, p. 225; Act Feb.

8, 1791, *Laws*, ed. 1797, p. 331); while in 1842 (*Rev. Stats.*, c. 136, sec. 4) the requirements of a sufficient fence were prescribed. Such a fence need not be more than four feet high: *Pub. Stats.*, c. 143, sec. 5. Although these provisions in one sense imposed a burden upon real estate ownership, the purpose of the legislature, as shown by the titles of the earlier acts "for the regulation of cattle, cornfields, and fences," was to make provision in reference to the control of domestic animals—to regulate the use and keeping of such property": *Morey v. Brown*, 42 N. H. 373, 375. No one has ever been required to fence his land who does not improve it, or who "lays it in common": *Pub. Stats.*, c. 143, sec. 14. The theory of these statutes is simply that where adjoining owners each desire the exclusive use of their land, the expense of effecting the mutual purpose should be equally divided between them: *Pub. Stats.*, c. 143, sec. 1.

The constitutional objection made to the present statute raises the question, if it appears that the statute is an interference with the defendant's property right, whether the interference is or not one which the legislature might properly make as a regulation of the use of property. The constitutionality of similar statutes has been upheld upon the latter ground, as being merely a small limitation ²⁸ of existing rights incident to property, which under the police power may be imposed for the sake of preventing a manifest evil. "It is hard," it has been said, "to imagine a more insignificant curtailment of the rights of property": *Rideout v. Knox*, 148 *Mass.* 368, 372, 373, 12 *Am. St. Rep.* 560, 19 *N. E.* 390, 2 *L. R. A.* 81; *Karasek v. Peier*, 22 *Wash.* 419, 61 *Pac.* 33, 50 *L. R. A.* 345; *Western etc. Co. v. Knickerbocker*, 103 *Cal.* 111, 37 *Pac.* 192. Similar statutes in Maine, Vermont and Connecticut have been before the courts, but it has not been suggested that the power of the legislature to adopt them has been attacked in those states: *Lord v. Langdon*, 91 *Me.* 221, 39 *Atl.* 552; *Harbison v. White*, 46 *Conn.* 106; *Gallagher v. Dodge*, 48 *Conn.* 387, 40 *Am. Rep.* 181-183, note.

The present statute was passed in 1887: *Laws 1887*, c. 91. In *Hunt v. Coggin*, 66 *N. H.* 140, 20 *Atl.* 250, the verdict was for the defendant; and in *Horan v. Byrnes*, 70 *N. H.* 531, 49 *Atl.* 569, the defendant waived any objection to the statute upon this ground. In *Lovell v. Noves*, 69 *N. H.* 263, 46 *Atl.* 25, the question was whether abuilding was within the

terms of the statute. The constitutional question is now presented for the first time.

It is objected in answer to the argument that statutes like the present are within the constitutional exercise of the police power, involving for the general good some slight limitation of existing property rights, that if one incident of the property right in real estate is the right to use it maliciously for the sole purpose of injuring another, it is as much an invasion of the right to take it from a small portion as from the whole of one's property; and that the matter in question concerns private individuals and not the public in general, and hence does not come within the police power: *State v. White*, 64 N. H. 48, 50, 5 Atl. 828. It may be thought these objections are successfully answered in the cases cited, or that, if not there answered, a satisfactory answer can be found. But a discussion of these objections does not reach the fundamental question in the case.

"The statute was designed to prevent an act the sole effect of which would be to annoy or injure another": *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25. The primary question, therefore, is whether one's right to use property solely to injure another is a part of his property right in real estate, which is so protected by the constitution that the prohibition of such use is not within the general power of legislation "for the benefit and welfare of this state and for the governing and ordering thereof": Const., art. 5. Upon the question whether a fence on or near the division line between adjoining land owners, maliciously built to an unreasonable height for the sole purpose of annoying and injuring the adjoining owner or occupant, is a nuisance which can in the absence of statutory authority be abated by an injunction, the courts are in conflict: *Letts v. ⁹⁷ v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, answers the question in the negative, while an opposite conclusion is reached in Michigan: *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510, 45 N. W. 381, 8 L. R. A. 183; *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457. In *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81, and *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345, cases in which the power of the legislature to enact a statute similar to that under consideration is attacked and upheld, it is conceded "that to a large extent the power to use one's property malevolently, in any way which would be lawful for other

ends, is an incident of property which cannot be taken away even by legislation": *Rideout v. Knox*, 148 Mass. 372, 12 Am. St. Rep. 560, 19 N. E. 392, 2 L. R. A. 81.

The conclusion that a land owner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is "based upon a narrow view of the effect of the land titles," and is reached "by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim," *Cujus est solum, ejus est usque ad coelum*. The courts of this state have had in some respects, at least, a different understanding of the elements of land ownership. As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test has been considered to be not merely whether the act was an exercise of dominion on the land regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other: *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; *Ladd v. Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 577, 82 Am. Dec. 179. It has been said that the rule of absolute dominion is easier of application: *Chase v. Silverstone*, 62 Me. 175, 183, 16 Am. Rep. 419. This view, however, does not seem to be upheld by the difficulties met in its application in reference to surface waters: See *Franklin v. Durgee*, 71 N. H. 186, 189, 51 Atl. 911, 58 L. R. A. 112. But however that may be, difficulty in administration is not a sufficient reason for the denial of justice. Cases like *Chatfield v. Wilson*, 28 Vt. 49, and *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, in which the principle of the maxim relied upon is applied to waters in the soil, are not authority here, where a contrary view is entertained: *Franklin v. Durgee*, 71 N. H. 186, 189, 51 Atl. 911, 58 L. R. A. 112; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 577, 82 Am. Dec. 179.

Aside from the authorities in cases in which the control of waters was in question, the leading case appears to be *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461. Here, although the plaintiff alleged that the fence complained of was erected solely to injure her, the decision is upon the ground that by the erec-

tion of the fence the plaintiff ⁹⁸ is deprived of no right, but is merely prevented from acquiring a right. If by enjoyment of light and air across his neighbor's land for the prescriptive period a land owner could acquire a right to such enjoyment, the building of a fence as an assertion of a contrary right and to prevent the acquiring of such easement would be a building for a necessary and useful purpose, and not for the sole purpose of annoying another. The case standing upon a view of the effect of nonuser of a right to build, now generally abandoned in this country (Washburn on Easements, 490, 497, 498), is not of value in the present discussion. The argument generally is, that the motive with which one does an act otherwise lawful is immaterial; and hence, as it must be conceded that a land owner has the right to build on his land as he conceives may best subserve his interests, the act lawful for a useful purpose is not made unlawful and a nuisance merely by the intent accompanying it.

Whether the first proposition is entirely true may perhaps be doubted. Cases cited to support the proposition (Walker v. Cronin, 107 Mass. 555; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93) do not support it in its entirety: See Chesley v. King, 74 Me. 164, 43 Am. Rep. 569. In Houston v. Laffee, 46 N. H. 505, which was trespass for cutting an aqueduct pipe maintained by the plaintiff upon the defendant's land by a parol license, it was held that if the cutting of the pipe was done simply for the purpose of putting an end to the license, and without any malice or intentional wrong, the defendant would not be liable; but if the pipe was cut "wantonly, unnecessarily, maliciously, and with a view . . . to injure the plaintiff," the defendant would be liable. It is true that an act which one has the right to do under all circumstances, like the bringing of a suit upon a valid claim (Friel v. Plumer, 69 N. H. 498, 76 Am. St. Rep. 190, 43 Atl. 618), cannot be made actionable by the motive which accompanies it. But as applied to the use of real estate the argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, for the character of the use is an element of the right.

"As a general proposition, it is safe to say that the owner of land has a right to make a reasonable use of his property; and

that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and a cellar as deep as he pleases, but he may erect his building as high as he pleases into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim, 'Sic utere tuo ut alienum non lædas.' The erection ²⁰ and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course, the land owner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others, to be determined by the nature of the rights and interests to be affected, and all the circumstances of each particular case": Ladd, J., in *Garland v. Towne*, 55 N. H. 55, 58, 20 Am. Rep. 164.

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . The soil is often called property, and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. . . . So these proprietary rights, which are the only valuable ingredients of a land owner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. . . . One of Eaton's proprietary rights was the correlative of R.'s duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation, as would be unreasonable and injurious to the enjoyment of Eaton's farm": *Thompson v. Androscoggin Co.*, 54 N. H. 545, 551, 552, 554. "Excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable": *Swett v. Cutts*, 50 N. H. 439, 447, 9 Am. Rep. 276.

"If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express

purpose of destroying his neighbor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously and without profit or benefit to himself? By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. . . . It must be remembered that no man has a legal right to make a malicious use of his property . . . for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine in cases like the present to injure and destroy the peace and comfort, and to damage the property, of one's neighbor, ¹⁰⁰ for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country exist either in the use of property or in any way or manner. . . . The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor": Morse, J., in *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838, approved and unanimously adopted in *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510, 45 N. W. 381, 3 L. R. A. 183, above cited.

"While one may in general put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. . . . What standard does the law provide? . . . Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances": *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 186, 37 Atl. 1041. "The common-law right of the ownership of land, in its relationship to the control of surface water, as understood by the courts of this state for many years, does not sanction or authorize practical injustice to one land owner by the arbitrary and unreasonable exercise of the right of dominion by another" (*Franklin v. Dudgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112), but makes the test of the right the reasonableness of the use under all the circumstances. In such case the purpose of the use, whether understood by the land owner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use. The

question of reasonableness depends upon all the circumstances—the advantage and profit to one of the use attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary. There is no sound ground upon which a distinction can be made against the plaintiff's right to use his land for the enjoyment of the air and light which naturally come upon it, in favor of his right to use it to enjoy the waters which naturally flow upon or under it, except the fact that the use of land for buildings necessarily cuts off air and light from the adjoining estate. The fact that the improvement of real estate in this way for a useful purpose, universally conceded to be reasonable, may affect the adjoining owner's enjoyment of his estate to the same extent as a like act done solely to injure the other, is not a sufficient ¹⁰¹ reason for distinguishing the right to build upon the surface from the right to dig below it or to control the surface itself. Jurisdictions which reject the doctrine of reasonable necessity, reasonable care, and reasonable use, which "prevail in this state in a liberal form, on a broad basis of general principle" (*Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176), as applied to the ownership of real estate, in favor of the principle of absolute dominion, may properly consider a malicious motive immaterial upon the rightfulness of a particular use; but in this state, to do so would be to reject the principle announced in *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, and repeatedly reaffirmed during the last forty years.

It is to be conceded that the maxim, "*Sic utere tuo ut alienum non lædas*," is to be applied as forbidding injury, not merely to the property, but to the right of another: *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Pittsburg etc. Ry. Co. v. Bingham*, 29 Ohio St. 364; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Bonomi v. Backhouse*, El. B. & E. 622, 643; *Jeffries v. Williams*, 5 Ex. 792. But the land owner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a land owner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a

right inherent and essential to the common enjoyment of property by the limitations of an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*; though in particular cases it may be said that no right is invaded unless something comes from the one lot to the other: *Lane v. Concord*, 70 N. H. 485, 488, 489, 85 Am. St. Rep. 643, 49 Atl. 687; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 552; *Wood's Law of Nuisance*, sec. 611. As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right. Hence it is not necessary to inquire whether, as an invasion of property rights, the limitation of the statute is one which might properly be made for the general good.

Other grounds suggested at the trial in support of the motion for a nonsuit have not been argued, and are understood to be waived. The objection based upon the unconstitutionality of the statute is not sustained, and the exception to the denial of the motions for a nonsuit and to direct a verdict upon that ground is overruled.

¹⁰² The defendant's wife, Ann, being a witness in his behalf, whether she had any bias, prejudice, or hostility toward the plaintiff which might affect her testimony, was a material question: *Martin v. Farnham*, 25 N. H. 195. As she denied having any ill-will toward the plaintiff or his family, it was therefore proper that she should be inquired of upon cross-examination as to a statement made by her tending to show such feeling of hostility as might tend to color her testimony. She denied making such statement, but admitted that at another trial when she was present the statement in question had been testified to, and that she did not then deny it. The inquiry as to the testimony at the former trial was not made for the purpose of calling the matter to the witness' recollection, and thereby enabling her to withdraw the denial if erroneous, but for the purpose of establishing the falsity of her denial that she had made the statement, and as tending to show that the declaration was in fact made by her. The question therefore is, whether from the fact that a person present at a judicial proceeding hears in silence a statement testified to by a witness, it can be inferred that by such silence he admits the truth of the statement. "No principle is better settled than that a man's silence upon an

occasion when he is at liberty to speak, and the circumstances naturally call upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence. . . . The circumstances must not only be such as afforded an opportunity to . . . speak, but properly and naturally called for some action or reply from men similarly situated": *Corser v. Paul*, 41 N. H. 24, 29, 77 Am. Dec. 753; 1 *Greenleaf on Evidence*, sec. 198. The neglect to reply to statements made in one's presence is not an admission of their truth unless they are addressed to the party, or made under such circumstances as to require a reply: *Gale v. Lincoln*, 11 Vt. 152; *Hersey v. Barton*, 23 Vt. 685, 687, 688.

The only fact appearing in the case, that the witness *Ann* was present at the trial when the statement in question was testified to, does not bring the case within the rule. She would have had no right to interrupt the proceedings to interpose her denial. Her attempt to do so would have been a violation of the rules of order in judicial proceedings, and if persisted in might have subjected her to punishment. Even if she were a party to the suit on trial, she would have had no more right to interrupt a witness upon the stand than any bystander, and her attempt to do so would be an equally grave impropriety. Even if she was or could have been called as a witness, her position as a party would give her no right to volunteer testimony upon the stand; her duty would be to answer such interrogatories as might be put to her by counsel, whose duty it would be to elicit such testimony as was material ¹⁰³ and important in the case on trial—not to call upon her to testify for the purpose of guarding against future controversies. The statement may have been immaterial in the former trial. It may have been made by a witness so wanting in credibility as not to merit denial, or the case itself may have utterly failed on the merits against the witness, so that no reply to any part of it was advisable. The fact, therefore, that the witness did not deny the statement when made in her presence at a former trial was incompetent as tending to establish the falsity of her testimony, and should not have been admitted: 1 *Greenleaf on Evidence*, sec. 198, note; *Melen v. Andrews*, *Moody & M.* 336; *Commonwealth v. Kenney*, 12 Met. 235, 237, 46 Am. Dec. 672; *Blackwell etc. Co. v. McElwee*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676; *Broyles v. State*, 47 Ind. 251. The suggestion in *Blanchard v. Hopkins*, 62 Me. 119, that the rule is changed by the admission of the

parties to testify, is not sustained by the reasons for the exclusion or the modern authorities: *Blackwell etc. Co. v. McElwee*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676; *Broyles v. State*, 47 Ind. 251. Whether the evidence of the plaintiff's wife as to the loss of her wedding ring had any tendency to show such ill-will on the part of the defendant's wife toward the plaintiff or his family as would affect her credibility, was a question of remoteness determinable at the trial. The evidence improperly admitted was upon a material issue, and had a plain tendency to prejudice the defendant. For this error the verdict must be set aside.

Exception sustained.

All concurred.

A *Property Owner* may, it seems, in the absence of a controlling statute, cut off the air and light from his neighbor's premises by building a high fence or other structure on his own land, without regard to the motive by which he is actuated: *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; *Metzger v. Hochrein*, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308, 50 L. R. A. 305. See, also, *Fisher v. Feige*, 137 Cal. 39, 92 Am. St. Rep. 77, 69 Pac. 618, 59 L. R. A. 353; *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; and compare *Medford v. Levy*, 31 W. Va. 649, 18 Am. St. Rep. 887, 8 S. E. 302, 2 L. R. A. 368. It has been held that the legislature is not competent to forbid a land owner from wasting subterranean waters: *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933, 94 N. W. 354. It is believed, however, that this decision is unsound: See *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 99 Am. St. Rep. 35, and note.

HENDRY v. NORTH HAMPTON.

[72 N. H. 351, 56 Atl. 922.]

NEGLIGENCE—Proximate Cause.—If a hole in a highway gives a bicycle rider thereon an impetus which carries him over an unrailed and dangerous embankment, to his injury, the hole, and not the embankment, cannot, as matter of law, be regarded as the cause of the injury. (p. 682.)

MUNICIPAL CORPORATIONS—Defective Highway.—If a town allows an embankment along a highway therein to remain in an unrailed and dangerous condition, it is liable to a bicycle rider who, without fault on his part, is injured thereby. (p. 684.)

HIGHWAYS—Defects in.—A bicycle rider injured by reason of a defect in a highway, consisting of an unrailed and dangerous embankment, rendering it unsuitable for ordinary travel, is entitled to recover for an injury received thereby. (pp. 684, 685.)

While plaintiff was slowly riding a bicycle along a highway in the defendant town, and exercising due care, she ran into a

mud puddle, and was thrown over an unrailed and dangerous embankment adjoining the road, and received the injuries for which she seeks to recover. Verdict for plaintiff and defendants excepted.

Emery, Simes & Corey, for the plaintiff.

Page & Bartlett, for the defendants.

353 REMICK, J. 1. It is found by the superior court that there was evidence tending to prove that the plaintiff was in the exercise of due care. Furthermore, we have examined the evidence for ourselves, so far as it is made a part of the record, and are of the opinion that it warrants the finding of the superior court in this particular. The defendants' motions for a nonsuit and verdict, upon the ground that the plaintiff was not in the exercise of due care, were therefore properly overruled. The defendants' requests for instructions upon this point, so far as they embodied a correct statement of the law, were given in substance; and no error appears either in the instructions given or in the refusal of those requested.

2. The contention of the defendants, that because the hole in the road gave to the plaintiff the impetus which carried her over the unrailed and dangerous embankment, therefore the hole—not the unrailed embankment—was as a matter of law the cause of her injury, is best answered by the authorities, which are so conclusive against the defendants' contention, at least in this jurisdiction, that to enter upon a discussion of the question would be a work of supererogation: *Littleton v. Richardson*, 32 N. H. 59, 63; *Stark v. Lancaster*, 57 N. H. 83; *Merrill v. Claremont*, 58 N. H. 468; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1, 51 Atl. 281; *Templeton v. Montpelier*, 56 Vt. 328; *Elliott on Roads and Streets*, sec. 617. According to the view contended for by the defendants, there could have been no recovery in *Norris v. Haverhill*, 65 N. H. 89, 18 Atl. 85, 163 Briefs and Cases, 159, and *Seeton v. Dunbarton*, 72 N. H. 269, 56 Atl. 197. An able and instructive discussion of the question may be found in *Sherwood v. Hamilton*, 37 U. C. Q. B. 410, where the conflicting authorities are exhaustively reviewed and the New Hampshire rule adopted, as being in accordance with the weight of authority and the better reasoning. The instructions given upon this point were in accordance with the principles established by the authorities cited, and the instructions requested were properly denied.

3. The defendants' next and last contention is that section 1, chapter 59, of the Laws of 1893, making "towns . . . liable for damages happening to any person, his team or carriage, traveling upon ^{and} a bridge, culvert, or sluiceway, or dangerous embankments and defective railings, upon any highway, by reason of any obstruction, defect, insufficiency, or want of repair of such bridge, culvert, or sluiceway, or dangerous embankments and defective railings which renders it unsuitable for the travel thereon," imposes no duty upon towns to build and maintain suitable bridges, culverts, sluiceways, or railings for the protection of persons riding bicycles, and no liability for injuries happening to such persons from defects in these particulars.

Under a statute providing "that any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways . . . in reasonable repair and in condition reasonably safe and fit for travel," may recover just damages of the town in default, the supreme court of Michigan has held that a person injured while riding upon a bicycle, by reason of a condition of the highway unsuitable for that mode of travel, but reasonably safe for travel in ordinary vehicles like wagons and carriages, cannot recover; that at the time the law was enacted bicycles were in use only to a limited extent, and the legislature did not intend to place upon townships and cities the burden of keeping their roads and streets in a safe condition for that kind of conveyance; that reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities: Mich. Comp. Laws 1897, c. 91, sec. 1; *Leslie v. Grand Rapids*, 120 Mich. 28, 78 N. W. 885.

Construing a statute of New York which provided that "every town shall be liable for all damages to person or property, sustained by reason of any defect in its highways or bridges," the court said: "It cannot be successfully claimed that a larger measure of duty on the part of commissioners of highways is due to bicycle riders than to persons traveling upon the road in ordinary vehicles. It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, and the great increase in the number of persons using these vehicles has created a demand for better and safer roads; but under the present highway laws a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain": N. Y. Rev. Stats., 8th ed., p. 3972, sec. 16; Stephen

v. North Hampstead, 80 Hun, 409, 411, 412, 30 N. Y. Supp. 128.

In Massachusetts it is provided that "if a person receives or suffers bodily injury, or damage in his property, through a defect, or want of repair or of sufficient railing, . . . he may recover . . . the amount of damage sustained thereby." Construing this statute, the court said: "The statute . . . was passed ³⁵⁵ long before bicycles were invented, but although, of course, it is not to be confined to the same kind of vehicles then in use, we are of the opinion that it should be confined to vehicles ejusdem generis, and that it does not extend to bicycles. . . . A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire; but this is easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without having his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road, may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It may impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety." It was accordingly held that a road which is reasonably safe for ordinary travel is not defective merely because not fit for use by bicycles: Mass. Pub. Stats., c. 52, sec. 18; *Richardson v. Danvers*, 176 Mass. 413, 79 Am. St. Rep. 320, 57 N. E. 688, 50 L. R. A. 127; *Rust v. Essex*, 182 Mass. 313, 65 N. E. 397.

Of the soundness of these decisions and their applicability to our statute we need not inquire, for they fall far short of deciding that a bicycle rider injured by reason of a defect in the highway rendering it unsuitable for ordinary travel is without remedy, merely because when injured he was in the saddle of a bicycle instead of on a wagon seat, or a horse's back, or on his feet pushing a bicycle. In *Rust v. Essex*, 182 Mass. 313, 65 N. E. 397, the court assumed that if the highway could have been found defective for ordinary travel, the plaintiff "might have recovered for his injuries, notwithstanding the fact that he was riding upon a bicycle." The Michigan and New York cases convey the same idea.

The defect complained of in the present case was an unrailed and dangerous embankment. We must assume from the instructions of the court and the verdict of the jury that it rendered the highway unsuitable, not only for traveling by bicycle, but for ordinary travel as well. This being so, we see no reason why the fact that the plaintiff was on a bicycle, instead of on horse-

back, or on foot pushing her bicycle, should preclude her recovery. Common sense rejects the distinction. The statute furnishes no warrant for it, either in letter or spirit. It says: "Towns are liable for damages happening to any person . . . traveling," etc., without any expressed limitation as to the mode of conveyance. "A traveler is one who travels in any way." To travel is "to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance." Traveling is "the act of making a journey; change of place; passage." The word "traveling," as used in some penal statutes, may have a narrow meaning; but in order to maintain an action against a city or town for a defect in a highway, ³⁵⁶ one need be a traveler only in the general sense above indicated: *Hardy v. Keene*, 52 N. H. 370, 377; *Hamilton v. Boston*, 14 Allen, 475, 483; *Black's Law Dictionary*, 1185; *Century Dictionary*, tit. "Travel," "Traveler," "Traveling." It should also be observed that the bicycle is recognized by the public policy of New Hampshire as a legitimate method of traveling upon the highway, and that it is in common use for that purpose, with general consent: *Laws 1897*, c. 61, sec. 1, c. 93.

Being a traveler upon the highway, both according to the literal meaning of that term and by the public policy of the state as clearly manifested by the legislation and general custom referred to, the plaintiff, notwithstanding she was riding on a bicycle, was entitled at least to a highway in condition suitable for ordinary travel, and to damages happening to her by reason of any unsuitableness of the highway for such travel. It follows that the instructions given upon this point were correct, and that those requested were properly denied.

The question discussed as to whether a bicycle is a carriage, within the meaning of the statute, seems quite immaterial to the present case, because the plaintiff claims nothing on account of damage to her wheel, and her right to recover for damage to her person is in no way dependent upon the means by which she was moving, so long as she was a traveler and in the exercise of due care. But if the question were material, and the instruction that a bicycle is not a carriage erroneous, the error was entirely in the defendants' favor and prejudicial to the plaintiff alone.

Exceptions overruled.

All concurred.

For Authorities bearing upon the decision in the principal case, see *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292, 59 N. E. 347; *Uptown v. Town of Windham*, 75 Conn. 288, 96 Am. St. Rep. 197, 53 Atl. 660; *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St.

the written contract is not plain and unmistakable, but is open to more than one interpretation, the reasonableness of one meaning as compared with the other, ⁴⁹⁸ and the probability that men in the circumstances of the parties would enter into one agreement or the other, is competent for consideration on the question what the agreement was which the written contract establishes: *Kendall v. Green*, 67 N. H. 557, 42 Atl. 178. The substance of clauses 2 and 3 is, that upon notice of legal proceedings founded upon an accident covered by the policy the insurance company will take over the management of the suit, assume and discharge the risk, reserving the right at any time to terminate the liability by the payment of the indemnity or such part of it as they might agree upon with the assured, as was done in *Bain v. Atkins*, 181 Mass. 240, 92 Am. St. Rep. 411, 63 N. E. 414, 57 L. R. A. 791. These clauses apply only upon a loss covered by the policy. If the company proceeded thereunder, they might be estopped to deny their liability: *Glen Falls etc. Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411, 42 N. Y. Supp. 285.

The purpose and meaning of clause 8 is apparent upon consideration of the situation which the parties must have contemplated as a probable result of their engagements. It is not probable that the parties contemplated and attempted to provide for the contingency of a suit between themselves upon a claim as to which the liability of the insurance company was conceded. An inspection of the policy, which is made a part of the case, discloses a "special agreement" B and "general agreements" 4 and 5, to the effect that the policy does not cover certain accidental injuries for which the insured might become liable. Whether the policy covered a particular accident, was a question as to which it could be foreseen controversy might arise. It was, therefore, within the contemplation of the parties that a suit might be brought against the insured for accidental injuries not covered by the policy. No claim except for immediate surgical relief could accrue against the company without notice of a suit. Upon the receipt of such notice, the company was called upon to recognize or deny liability. If they denied their liability, and refused to perform their contract of indemnity in the manner specified in clause 2, such decision would not be binding upon the assured; and in a controversy between the parties, the assumption of the defense by the company might be considered to be an admission of liability under the policy. There was no reason why they should defend if not liable. The

purpose of clause 8 was, therefore, to provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured.

499 In this case the insurance company undertook the investigation of the case, and, after suit was brought, assumed the entire defense by their counsel and conducted the same to final judgment. The present action is not one respecting a loss by the insured under the policy. The defendants' contention that the assured have lost nothing because they have paid nothing may, so far as the case is concerned, be conceded. The proceeding is not even to enforce the agreement of the policy, to assume the liability; but the plaintiff's case stands upon the legal result of the assumption of liability by the company. Because they assumed—in legal effect agreed to pay—the assured's liability to this plaintiff to the extent of five thousand dollars, equity requires them to perform their agreement by payment to him. It may also be conceded, though it cannot be decided in this case, that if the insurers had denied liability for any claim arising out of the plaintiff's injury, or had refused to take charge of the suit, no action could have been maintained against them except by the assured upon payment of a judgment after a trial of the issue. The defendants' construction of the policy may to this extent be correct, but it has no application to the present case.

Counsel for the insurance company, in their brief, reach the conclusion that clause 8 does not prevent an action by the assured for breach of the agreement to defend. It is immaterial whether this conclusion is best founded upon a definition of the word "loss"—upon whether it means "claim for damages" merely, or both that and the cost of litigation—or upon the ground that the contract cannot be understood at the same time to give a right and prohibit its enforcement. It is sufficient that on one ground or the other clause 8 cannot be construed to prohibit an action for a breach of the contract to defend. If it does not, neither does it prohibit an action for breach of the engagements to settle or pay the indemnity to the assured contained in the same clause. If none of these engagements have

been performed, the existence of a subsisting obligation on the part of the insurance company is established.

The defendants urge that there is a greater risk of unfavorable verdicts and of greater verdicts in suits like the plaintiff's against the paper company when the defendant is insolvent and not a going concern, and that the policy was intended to protect against this risk by providing that there should be no liability for any policy holder who was unable to pay the judgment. The difficulty with this argument is that it is not the inability to make payment, but the nonpayment, which the construction claimed would make material. If it was intended that insolvency at the time of the trial should avoid the policy, a provision to that effect could easily have been inserted.

500 The insurers chose to protect themselves from that class of business by declining it, instead of providing for the contingency in the policy, or adjusting the premiums charged with reference thereto. The insolvency which prevents payment is insolvency after judgment, and not during the trial, and might, as was the case in *Bain v. Atkins*, 181 Mass. 240, 92 Am. St. Rep. 411, 63 N. E. 414, 57 L. R. A. 792, be produced by the judgment itself. It does not necessarily follow that because an insured was insolvent he could not arrange for a payment of such a claim. The provision would be entirely ineffective to guard against the risks of insolvency, whatever they are. The paper company are not in bankruptcy. There is nothing to prevent their making some payment to the plaintiff, if not more than the dollar which has already been paid by the sale of their property, and which at least, on the defendants' own contention, they are now legally liable to pay. Every dollar paid over by the paper company would establish a fresh obligation of the insurance company to pay until the five thousand dollar limit was reached. Insolvency merely could not be a practical defense against the will of the assured. To effect the purpose for which it is claimed the provision was inserted, it would be necessary to limit the insurers' liability to the reimbursement of the insured for the value of his property sold under execution in a suit upon a claim covered by the policy. It is not probable the object of the provision was a purpose it is so ill-adapted to effect.

Great stress has been placed upon the two decisions upon like policies in New Jersey and Maine: *Frye v. Bath etc. Co.*, 97 Me. 241, 94 Am. St. Rep. 500, 54 Atl. 395, 59 L. R. A. 444; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep.

663, 49 Atl. 720. In neither of these cases, as has been stated, was any attention given to the stipulations as to the manner in which the contract of indemnity was to be performed, while in the Maine case the parties apparently abandoned these provisions of the contract, for the defense of the original suit was not conducted in accordance with the terms of the present contract, but by the assured and the insurers jointly, and the question of the effect of the assumption of the defense and sole control of the original suit was not and could not have been raised.

The weight of the New Jersey case as an authority is diminished by the opinion in the court of chancery holding the contrary view, which is more in accord with the authorities on the question in this jurisdiction to which reference has been made. Notwithstanding the respect due to the opinions of these courts, the results reached in them cannot be followed in this jurisdiction. The proceeding is in equity and not at law. The facts that the plaintiff is in no way a party to the contract of indemnity, that he paid no part of the consideration, that the contract was one exclusively ⁵⁰¹ between the paper company and the insurance company for the protection of the former, upon which reliance is placed, are not decisive in equity. In *Holt v. Penacook Sav. Bank*, 62 N. H. 55, Holt was not a party to the mortgage which he sought to enforce. It was not made for his benefit, but to indemnify Gage from his liability as surety. Gage had never been and could not be damaged, because it had been judicially determined that he was not liable to the plaintiff; but Holt's right to the provision that had been made by his debtor for the ultimate discharge of his debt in case the surety paid was maintained. The ground upon which the plaintiff's equitable right to the provision made by his debtor for the ultimate discharge of a claim which might arise against him can, consistently with the authorities in this state, be denied, is not apparent. Neither is it clear that the paper company, while unable to maintain an action at law upon the policy without payment of the judgment against them, might not in equity obtain such a performance of the contract of indemnity as would protect them without such prior payment. There are authorities in this state and elsewhere tending to sustain power in equity to compel the specific performance of a contract to indemnify before there has been such a breach of the contract as would sustain an action at law. "In equity," it is said, "the plaintiff need not pay and perhaps ruin him-

self before seeking relief. He is entitled to be relieved from liability": *Johnston v. Salvage Assn.*, L. R. 19 Q. B. Div. 458, 460. See, also, *Hunt v. New Hampshire Fire etc. Assn.*, 68 N. H. 305, 73 Am. St. Rep. 602, 38 Atl. 145, 38 L. R. A. 514, and cases cited; *First Nat. Bank v. Hunton*, 70 N. H. 224, 46 Atl. 1049; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343; *Burroughs v. McNeill*, 2 Dev. & B. Eq. (22 N. C.) 297, 302; *Central Trust Co. v. Louisville Trust Co.*, 87 Fed. 23; *Banlaugh v. Hayes*, 1 Vern. 190; *Lacey v. Hill*, L. R. 18 Eq. 182; *Wolmershausen v. Gullick* [1893], 2 Ch. 514; *Cruse v. Paine*, L. R. 6 Eq. 641, 4 Ch. App. 441; *Story's Equity Jurisprudence*, sec. 850; *Bishop's Equity*, sec. 331; *Lindley on Partnership*, 375.

Except for the provision that the damages must be ascertained by a judgment after a trial of the issue (immaterial in this case, because such trial had been had), clause 8 is a mere statement of the law. The surety cannot sue the principal until he has paid the debt; but that does not prevent the interposition of equity to require the principal to pay and save the surety harmless.

But it appears sufficient to rest the decision upon an interpretation of the contract which gives effect to all its provisions, avoids any conflict between them, and is fairly and reasonably inferable from the evidence. The view that the contract means that the insurance company, after taking control of the proceedings in a suit against the assured, cannot thereafter be discharged except by payment of the indemnity to the assured or securing his discharge ⁵⁰² from the claim, is thought to best conform to the intent of the parties, and is adopted. Whether in a case where the company did not so proceed the assured could in any form of procedure obtain any benefit from the contract of indemnity, except upon proof of the payment of damages after a trial of the issue, is not now before the court.

Decree for the plaintiff.

Walker, J., did not sit; the others concurred.

For Authorities bearing upon the decision in the principal case, see American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; *Worcester etc. Ry. Co. v. Travelers' Ins. Co.*, 180 Mass. 263, 91 Am. St. Rep. 275, 62 N. E. 864, 57 L. R. A. 629; *Bain v. Atkins*, 181 Mass. 240, 92 Am. St. Rep. 411, 63 N. E. 414, 57 L. R. A. 791; *Kansas City etc. R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 74 Am. St. Rep. 545, 53 S. W. 205, 45 L. R. A. 380.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

MECHANICS' BANK v. CHARDAVOYNE.

[69 N. J. L. 256, 55 Atl. 1080.]

NEGOTIABLE INSTRUMENTS—Indorsement in Blank.—One who indorses a note in blank and intrusts it to another to fill up and have discounted for the indorser's benefit, is liable upon it to a bona fide holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was intrusted, notwithstanding that the latter filled it up for, and fraudulently converted it to, a purpose entirely different from that for which he was authorized to use it. (p. 705.)

NEGOTIABLE INSTRUMENTS—Indorsement in Blank—Bona Fide Holder.—If a bank receives a note in the regular course of business, in good faith and without notice of any infirmity in it, in payment of an indebtedness due from the person sending it, whose wife has indorsed it in blank, and intrusted it to him to discount for her benefit, the bank thereby becomes a bona fide holder of the note for value, and entitled to protection as such as against the wife of the sender of the note. (p. 705.)

Lambert & Stewart, for the plaintiff in error.

A. C. Wall, for the defendant in error.

257 GUMMERE, C. J. This suit was brought against William S. Chardavoyne and Annie N., his wife, upon a promissory note made by William to the order of Annie, and indorsed by her. The note is dated Newark, July 28, 1899, and is payable at the Mechanics' Bank, Brooklyn, New York. The case was tried by the court without a jury, by consent of the parties. The following are the pertinent facts found by the trial court: Mrs. Chardavoyne, about ten days or two weeks before July 28, 1899, intrusted her husband with a blank form of promissory

note, indorsed by her, to be filled up and signed by him, and used at the German National Bank of Newark, to obtain a loan for Mrs. Chardavoyne. The German National Bank refused to discount the note, and its refusal was reported to her. She never authorized her husband to use the note for any other purpose. Notwithstanding this fact, he, on the twenty-eighth day of July, took the blank note to the banking-house of the plaintiff company, in Brooklyn, New York, and the body of the instrument was then filled up by the plaintiff's president, at the request of Mr. Chardavoyne, for a sum equal to the amount of an indebtedness due from ²⁵⁸ Mr. Chardavoyne to the plaintiff. The next day the note was discounted by the plaintiff, and the proceeds placed to Mr. Chardavoyne's credit. The president of the bank, when he filled up the note, was ignorant of the fact that it had been indorsed in blank by Mrs. Chardavoyne, and the plaintiff took it, in the regular course of business, in good faith, without notice of any infirmity in it, and in payment of the indebtedness then due to it from Mr. Chardavoyne. On this finding of facts judgment was entered for the plaintiff against both the maker and indorser of the note. The writ of error is sued out by the indorser, Mrs. Chardavoyne, alone.

The principal ground upon which we are asked to reverse this judgment is that, upon the facts found, no liability on the part of Mrs. Chardavoyne can be predicated. The contention is that her husband had no authority to fill up the note, except for the purpose of having it discounted at the German National Bank for her benefit; that when this purpose failed her husband's agency ceased, and her indorsement became a nullity, and that his subsequent fraudulent act in having the blanks in the note filled up, and then appropriating it to the payment of his own indebtedness, did not render her responsible thereon as indorser.

An examination of the authorities, however, will disclose that this contention is untenable. The question to be determined in a case like the present is not what is the actual limit of authority conferred by the indorser of a blank note upon the person into whose hands she delivers it, but rather, what authority such an indorser, by her conduct, holds out that person as possessing, to one who takes the note in good faith, for value, and without notice that the actual authority conferred is a limited one only; and therefore, as is stated by Mr. Parsons (1 Parsons on Bills and Notes, 110), "it is no defense

against a bona fide holder, for value, to prove either that the person to whom the instrument was intrusted in blank had no authority at all to fill the blank; or that his authority was limited to a certain sum which he had exceeded; or that he was only authorized to use the paper for a particular purpose, and had fraudulently converted it to a different purpose; or ²⁵⁹ that he was only authorized to fill the blank upon a certain condition, which had not happened; or that the authority was limited in point of time, and that the time had expired." Practically the same statement appears in 1 Daniel on Negotiable Instruments, section 143, where it is said that "the authority implied by a signature in blank, and the credit granted, are so extensive that the party so signing will be bound, though the holder was only authorized to use it for one purpose, and has perverted it to another; and though the authority was limited to a time which has expired, or was only to be exercised upon a condition which has not happened."

The decided cases fully support the rule laid down by these authors.

As early as 1780, Lord Mansfield, in *Russel v. Langstaffe*, Doug. 514, declared that "the indorsement on a blank note is a letter of credit for an indefinite amount. By it the indorser says: 'Trust G. [the person who received the note from the indorser] to any amount, and I will be his security.' It does not lie in his mouth to say that the indorsement is not regular."

In *Gerrard v. Lewis*, L. R. 10 Q. B. Div. 30, it was held that "a man who gives his acceptance [to a bill of exchange] in blank, holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases."

In *Bank of Pittsburg v. Neal*, 63 U. S. (22 How.) 96, 16 L. ed. 323, it was held that "where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument," and that "a bona fide holder of such an instrument, for valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it before the same becomes due, holds the title unaffected by these facts, and may recover thereon."

In *Michigan Bank v. Eldred*, 76 U. S. (9 Wall.) 544, 19 L. ed. 763, it is declared ²⁶⁰ to be "well-settled law that where a party to a negotiable bill of exchange or promissory note, containing blanks, intrusts it to the custody of another, whether it be for the purpose of accommodating the person to whom it was intrusted or to be used to raise money for his own benefit, such bill or note especially if it be indorsed in blank, carries on its face an implied authority in the person to whom it is so intrusted to fill up the blanks in his discretion; and as between such party to the bill or note, and innocent third parties holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is that he acted under the authority of that party, and with his approbation and consent."

In *Van Duzer v. Howe*, 21 N. Y. 531, it was decided that "a party who intrusts another with his acceptance in blank is responsible to a bona fide holder, although the blank is filled with a sum exceeding that fixed as a limit by the acceptor."

In *Redlich v. Doll*, 54 N. Y. 235, 13 Am. Rep. 573, the rule is stated to be that "if a note be obtained from a maker by fraud; if it be made for one purpose and used by the holder for another; if it be delivered in blank, with an agreement that the blank shall be filled in one way, and it be filled in another; in all these cases the maker is liable to a bona fide holder for value. The maker, rather than the innocent holder, must suffer for his negligence or misplaced confidence."

In *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, it was held that "where a merchant intrusts his clerk with his blank indorsements, and one by false pretenses obtains and uses them (by writing and signing promissory notes upon the face of the blanks) such fraudulent use of them will not discharge the indorser against an innocent indorsee."

In *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, the rule is laid down that "if a man indorses a blank form of note, and delivers it with the intention that the blank should be filled, he thereby makes the person to whom he delivers it his agent, ²⁶¹ and is responsible for whatever date, sum or time of payment he may insert, to a bona fide indorsee."

In *Breckenridge v. Lewis*, 84 Me. 349, 30 Am. St. Rep. 353, 24 Atl. 864, it was decided that "one who intrusts his signature to another for commercial use—that is, to have some business

obligation written over it, becomes holden upon a negotiable promissory note fraudulently so written by the person so intrusted with it, and negotiated to an innocent holder."

It is unnecessary to multiply authorities. Enough have been cited to make it clear that one who indorses a promissory note in blank and intrusts it to another to fill it up and have it discounted for his (the indorser's) benefit, is liable upon it to a bona fide holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was intrusted, notwithstanding that the latter has filled it up for, and fraudulently converted it to, a purpose entirely different from that for which he was authorized to use it. Commercial paper is a part of the mercantile currency of the country, and in order that its free circulation may not be impeded, it is the settled policy of the law that innocent holders thereof, for value, should have a right to enforce payment of such paper against those who, by signing or indorsing it, either in blank or otherwise, have caused it to become a part of such currency.

It is further contended on behalf of the plaintiff in error that if it be considered that the indorser of a blank promissory note is liable to a bona fide holder, for value, under the circumstances existing in the present case, still the plaintiff bank is not entitled to recover against her, because it does not occupy that position. The fact is established by the finding of the trial court, as has already been stated, that the plaintiff bank took the note "in the regular course of business, in good faith, without notice of any infirmity in it." It is, therefore, a bona fide holder. The trial court further found that the bank took the note "in payment of an indebtedness then due" to it. So far as this state is concerned, the rule is entirely settled that a party taking a promissory note in payment of an antecedent debt is a holder of such note for a valuable ²⁶² consideration, and entitled to protection as such: *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Duncan Sherman & Co. v. Gilbert*, 29 N. J. L. 527. But, as the transaction out of which the plaintiff's right sprang took place in New York, the question to be determined is whether, by the law of that jurisdiction, one who so takes a promissory note is a holder for value. The plaintiff in error insists that the rule established in that state is that where the holder has received the paper as payment for an antecedent debt he is not such a holder, and refers us to a declaration to that effect contained in the opinion of this court in *Duncan Sherman & Co. v. Gilbert*, 29 N. J. L. 528.

No authority for this statement is cited in the opinion referred to, and an examination of the New York cases do not justify it.

On the contrary, the New York decisions on this subject, so far as we have been able to ascertain by an examination of the published reports of such decisions, are in entire harmony with our own. In 1840, more than twenty years prior to the decision in *Duncan Sherman & Co. v. Gilbert*, the supreme court of New York, in the case of *Bank of St. Albans v. Gilliland*, 33 Wend. 311, 35 Am. Dec. 566, held that "receiving a note for a precedent debt is receiving it for value, within the law-merchant, if it be taken in satisfaction of such precedent debt, and the indebtedness be canceled." To the same effect is the decision of the court of appeals in *Brown v. Leavitt*, 31 N. Y. 113, and in the later case of *Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 494, and *Mayer v. Heidelbach*, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850.

It is further urged on behalf of the plaintiff in error that as she received nothing for her indorsement, she is, at most, an accommodation indorser, and that section 5 of our married women's act (Gen. Stats., p. 2017) exempts her from liability on such a contract. In disposing of this contention it is enough to say that it has already been decided by this court that where a note, upon which a married woman puts her name, in this state, first comes into legal existence in the state of New York (as was the present case), the statutory provision appealed to affords her no protection: *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 49 Atl. 544, 54 L. R. A. 585.

203 The only other ground upon which the validity of the judgment below is attacked is based upon the claim set up by the plaintiff in error at the trial of the cause, that at the time of the transaction between her husband and the bank the former was insane, the contention being that the court erred in its holding with regard to the measure of liability upon contracts made by insane persons. It is quite immaterial, however, whether such error occurred or not. The trial court found as a fact that the husband of the plaintiff in error was not insane at the time when he delivered the note in suit to the plaintiff; and, as the testimony produced on the subject of Chardavoyne's sanity was amply sufficient to support this finding, it must be accepted by this court. Consequently, the ques-

tion of the measure of liability, under the conditions mentioned, is not involved in the decision of the case.

The judgment under review should be affirmed.

As to the Legal Effect of a Blank Indorsement of a negotiable note, see *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520, 20 S. W. 41; *Dennis v. Jackson*, 57 Minn. 286, 47 Am. St. Rep. 603, 59 N. W. 198; *Scollans v. Rollins*, 173 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 863.

The Alteration of Instruments by filling blanks therein discussed in the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 107-112. A reference to this note will show that where one has intrusted an instrument containing blanks to another with the intent to become bound thereon, he will be liable upon the instrument though the blanks be filled. He is deemed to have given an implied authority to the payee or holder to fill the blanks with the proper terms: See, also, *Boston Steel etc. Co. v. Steuer*, 188 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

HEIDECAMP v. JERSEY CITY, HOBOKEN AND PATTERSON STREET RAILWAY COMPANY.

[69 N. J. L. 284, 55 Atl. 239.]

PARENT AND CHILD—Adopted Children.—Next of Kin of an adopted child is the next of kin by blood and not the adopting parent, under a statute concerning adoption which wholly fails to bestow upon the adopting parent any right to inherit the estate of the adopted child. (pp. 708, 709.)

J. F. Mintburn, for the plaintiff in error.

W. D. Edwards, for the defendant in error.

284 VAN SYCKEL, J. This suit is brought by John Heidecamp, administrator of Annie Heidecamp, deceased, under our death act, for the benefit of the next of kin.

Previously to the injury which caused her death Annie had been adopted as the daughter of the plaintiff, under the "act concerning the adoption of infants," with the written consent of the mother.

285 The trial court held that the adopting father was not the next of kin, and that the natural mother could recover nominal damages only, and a verdict was directed accordingly. The plaintiff below is the plaintiff in error. The question to be reviewed is whether this instruction of the trial court is correct.

Our death act, under which this suit is prosecuted, provides that the action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and the sum recovered shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate.

The next of kin in this act must be held to mean the next of kin by blood, unless the "act concerning the adoption of infants" impresses upon the term a different meaning as applicable to this case.

Our "act concerning adoption" (Gen. Stats., p. 1714, pl. 17) provides "that, upon the entry of the decree of adoption, the parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child or children or from the child or children to them; and the child or children shall be free from all legal obligations of obedience or otherwise to the parents; and the adopting parent or parents of the child or children shall be invested with every legal right in respect to obedience and maintenance on the part of the child or children as if said child or children had been born to them in lawful wedlock; and the child or children shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate or to the distribution in personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock."

The statute expressly invests the adopting parent with every legal right in respect to obedience and maintenance on the part of the child as if the child had been born to them in lawful wedlock, but it wholly fails to bestow upon the ²⁹⁶ adopting parent any right to inherit the estate of the adopted child.

That the draftsman of the act did not intend to confer any such property right upon the adopting parent is emphasized by the immediately succeeding provision that the adopted child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate or to the distribution in personal estate, on the death of the adopting parents as if born to them in lawful wedlock.

The statute further provides that, on the death of the adopting parent and the subsequent death of the adopted child without issue, the property of such adopting deceased parent shall

descend to, and be distributed among, the next of kin of said parent, and not to the next of kin of the adopted child.

The adopting father is therefore excluded from inheriting, as the next of kin of the adopted child, not only by the failure of the statute to invest him with such right, but also by the declaration that, in determining who are the next of kin of the adopted child, regard is not to be paid to the fact of adoption; the next of kin of the adopted child are his next of kin by blood.

I have found no authority which will justify a different interpretation of our statutes.

Barnes v. Allen, 25 Ind. 222, holds that adopted children are the heirs of adopting father in the degree of children, and are entitled to inherit from him. No other construction could be given to the Indiana statute, which provides that the adopted child shall have the same interest in the estate of adopting parent, by descent or otherwise, as if the natural heir of such parent.

The question whether the adopting father could inherit from the child is not involved or discussed in the case.

In *Barnshisel v. Ferrell*, 47 Ind. 335, the court expressly declares that, as between the adopted child and the lawful children of the adopting parent, the legal relation as to inheritance is not changed or affected by the adoption; that on ²⁸⁷ the death of the adopted child, his next of kin by blood take from him.

In *Davis v. King*, 95 Ind. 1, it appears that, in 1883, the Indiana statute was amended by providing that property, real and personal, which came to the adopted child by gift, devise or descent from the adopting parent should, on the death of the child, go to the heirs of the adopting parent, the same as if such child had not been adopted.

The right of the adopting parent to succeed as next of kin to the child was not in this case.

In *Remders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802, the Missouri court expressly ruled that, on the death of the adopted child, his estate will go to his relations by blood, and not to those by adoption. This interpretation was based by the court upon the fact that the statute of that state does not provide who shall inherit from the adopted child, but only that the adopted child shall inherit from the adopting parent. *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698, *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370,

24 Atl. 948, 17 L. R. A. 435, and *Hartwell v. Teft*, 19 R. L. 644, 35 Atl. 882, 34 L. R. A. 500, give no support to the claim of the adopting parent.

John Heidecamp, therefore, cannot be regarded as the next of kin, and the action can be maintained only in the right of the natural mother of the deceased child, who is, under our law, the next of kin. She had abandoned her child and released all claims to her services, and was therefore legally entitled to no substantial damages. If it was error to direct a verdict for nominal damages, the plaintiff in error cannot complain.

There is no error in the direction of the trial court which was injurious to the plaintiff, and the judgment should therefore be affirmed.

For Authorities Bearing on the decision in the principal case, see the monographic notes to Van Matre v. Sankey, 39 Am. St. Rep. 226; In re Ingram, 12 Am. St. Rep. 100; and the subsequent cases of Quinn v. Quinn, 5 S. Dak. 328, 49 Am. St. Rep. 875, 58 N. W. 808; Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761, 39 L. R. A. 748; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445; Butterfield v. Sawyer, 187 Ill. 598, 79 Am. St. Rep. 246, 58 N. E. 602, 52 L. R. A. 75.

ENRIGHT v. OLIVER.

[69 N. J. L. 357, 55 Atl. 277.]

MASTER AND SERVANT—Negligence of Fellow-servant.—Employés of a common master engaged in a common employment of erecting a building or other structure are all fellow-servants, and if injury occurs to one of such employés by reason of negligent construction, caused by the carelessness of a coemployé, the master is not liable. (p. 712.)

MASTER AND SERVANT—Negligence of Fellow-servant.—If the master has furnished a sufficiency of safe appliances to select from in the construction of a building, he is not liable for an injury to an employé arising from the selection by a fellow-servant of an imperfect appliance not furnished by the master. (p. 714.)

MASTER AND SERVANT—Fellow-servants.—The Foreman of employés of a common master engaged in a common employment of erecting a building is a fellow-servant with them while directing or assisting them in the performance of the duties of the common employment, and the master is not liable for the negligence of such foreman resulting in injury to one of such common employés, except when his acts relate to personal duties due the employé from the master, and from which he cannot escape liability by delegating them to another. (pp. 714, 715.)

MASTER AND SERVANT—Negligence of Incompetent Fellow-servant—Assumption of Risks.—If an injury to an employé grows out of the negligence of his incompetent fellow-servant, and the con-

ditions and his incompetency were known to the injured employé, or should have been known to him by the exercise of ordinary care before exposing himself to the danger complained of, and yet without notice to the master, or seeking in any way to remedy such conditions, he continued in the employment which resulted in the injury, he must be held to have assumed the risk as an obvious one, and cannot recover of the master. (p. 716.)

MASTER AND SERVANT—Fellow-servants—Assumption of Risks.—Servants employed by or under the control of the same master, in a common employment, obviously exposing them to injury from the negligence of others so employed or controlled, although engaged in different departments of the common business, are fellow-servants, who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom. (pp. 716, 717.)

W. Dixon, for the plaintiff in error.

Bell, Edwards & Lawrence, for the defendant in error.

³⁵⁸ **HENDRICKSON, J.** The plaintiff, who is a carpenter, was engaged with other carpenters and with laborers in constructing center panels within the spaces made by the iron cross-beams of a large refrigerator building in Jersey City, then in course of erection, which were for the temporary support of a concrete floor then being laid in the several stories of the building. The work had progressed until the fourth floor had been reached, and the plaintiff, while engaged in nailing ³⁵⁹ the corners of a center panel, and in nailing and fitting together the sheathing-boards that had been laid down thereon, a defective support gave way under his weight, so that he fell through the sheathing to the floor below and sustained injuries thereby for which he brought suit against his employer, the defendant corporation.

The gravamen of the action was negligence in failing to provide proper support to the floor or sheathing upon which the plaintiff was working, and in failing to provide competent and skillful employes to lay and construct such flooring and in failing to properly inspect and maintain the same in a reasonably safe and sound condition while the plaintiff was working thereon in discharge of his duties.

At the close of the plaintiff's evidence at the trial motion was made for a nonsuit, upon the ground, among others, that the accident was the result of the negligence of a fellow-servant. The learned judge ordered a nonsuit, observing that the case was either within the principle of *Curley v. Hoff*, 62 N. J. L. 759, 42 Atl. 731, or within that of *Saunders v. Eastern*

Hydraulic Co., 63 N. J. L. 554, 76 Am. St. Rep. 222, 44 Atl. 630. We have not stopped to determine as to the applicancy of these cases, for we can more appropriately, we think, invoke in support of the nonsuit the doctrine of fellow-servant. It is contended for the plaintiff that the defendant failed in his duty to use reasonable care to provide for him a reasonably safe place in which to work. But this duty of the master does not apply where the place of work is one that the servants themselves undertake to erect and provide as one of the duties and undertakings of their common employment. In such a case, if any injury occurs to an employé by reason of negligent construction, caused by the carelessness of a coemployé, the master is not liable. This principle is clearly laid down by the supreme court in *Maher v. McGrath*, 58 N. J. L. 469, 33 Atl. 945, and in this court in *Olsen v. Nixon*, 61 N. J. L. 671, 40 Atl. 694. The only liability that could fall upon the master in such case would be for negligence in the selection of the workmen. And the general rule is also well established that employés of a common master, who are engaged in the common employment of erecting the same structure, ^{see} are all fellow-servants: 12 Am. & Eng. Ency. of Law, 1015, and note 2, where cases are cited. The same principle is recognized in *Maher v. McGrath*, 58 N. J. L. 469, 33 Atl. 945, where the plaintiff was a laborer, who sued the master for injuries received from the fall of a scaffold while attending upon masons engaged in constructing the walls of a brick building. One of the questions to be considered in this case is, Was the plaintiff injured through the fault of a coservant and not through the fault of the master? Some further statement of the facts may be helpful. The panel referred to as to form of construction is aptly described in the case as being like a box without top or bottom. It was about twenty feet by about six feet in dimensions and had a depth of eighteen inches. It rested upon hangers secured upon the beams. Upon the sides of the panel were also hangers or clips in which were laid putlogs, spoken of in the case as putlocks or footlocks, across the panel, upon which the sheathing was laid. The putlogs were five in number, and the sheathing was in two sections. In one section the boards were about fifteen feet in length and were met by the boards in the adjoining section, having a length of about five or six feet. The boards of the two sections were made so as to meet upon the fourth putlog. It is assumed that this putlog, by reason of the junction thereon of the two sections of the

sheathing, would naturally be subjected to the greater weight or strain from any encumbrance put upon it. The putlogs were out of three by four inch lumber, thirteen feet long, and in order to make three putlogs out of one piece of timber, the third one in some cases had to be cut an inch short. To supply this deficiency in length furring strips of the required dimension were nailed at the end with three or four nails. In placing the putlogs into the hangers or clips it was found that one out of the five was a short one that had been pieced; and that was the fourth in order upon which the two sections of the sheathing met. It was found after the accident that it was this fourth putlog which gave way under the plaintiff's weight, and while the putlog proper fell below, the furring strip had split off and was found in the hanger. It is contended by the plaintiff that ³⁰¹ the master was negligent in furnishing imperfect and defective putlogs, and was also negligent in employing unskillful workmen in the persons of ordinary laborers, who were attending upon the carpenters, to lay them down, whereby the defective putlog was placed in such a position as to cause the accident to the plaintiff, which otherwise would not have been at all likely to occur. And, first, as to the alleged negligence of the master in furnishing some putlogs which were pieced at the end and alleged to be thereby rendered defective. The putlogs were being made by some of the carpenters at work on the job. They had cut a number of them an inch short, in the way before stated, piecing them at the end, under the direction of the foreman, and then the president of the defendant company came along and stopped the cutting of any more short putlogs; and thereafter the practice was abandoned. The short putlogs continued to be used, but as fast as the concrete flooring laid upon the sheathing was set the temporary construction underneath was withdrawn and the lumber that remained fit was used again in other centers, so that as the case shows, there were plenty of putlogs for use, and a sufficient number at all times of the putlogs that were not pieced to select from using the imperfect ones.

These putlogs were selected by one or more of the carpenters, of whom there were at least six at work at the time of the accident, and they were carried by the laborers, as were the boards and other materials used, and placed alongside the panel for which they were intended. Now, regarding the putlog as an appliance which it was the duty of the master to furnish that would be reasonably safe for the purpose designed—

a duty that could not be delegated—still it is well settled that, where the master has furnished a sufficiency of safe appliances to select from, the master is not liable for an injury to an employé arising from the selection by a coservant of an imperfect appliance not furnished by the master for the purpose. This principle was laid down by this court in *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057, and in *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145. As before shown, the corporation had, by its president, plainly condemned ³⁶² the use of the pieced putlog, by directing the carpenters in charge of that work, and upon whom the duty of selection rested, to stop cutting and piecing putlogs in that way.

But, upon another principle, the master cannot be held to be negligent because there were imperfect putlogs upon the premises that might be brought into use. This was an appliance which the carpenters were to prepare, and did prepare, out of materials furnished by the master, in the course of their general work. It is not disputed but that the material furnished for the putlogs was of the proper quality and was sufficient in quantity. It therefore follows, upon the principle already stated, that any injury to a coemployé, by reason of faulty construction, does not fall upon the master: *Maher v. McGrath*, 58 N. J. L. 469, 33 Atl. 945. The fact that they acted under the direction of the foreman in charge of the men in doing what they did does not affect the question of liability. The foreman was, under the circumstances, a fellow-servant with the other employés engaged in the common employment.

The rule upon this subject is correctly laid down by the supreme court in *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324. The decision has been approved by this court in *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057, and *Olsen v. Nixon*, 61 N. J. L. 671, 40 Atl. 694. This rule was again very fully discussed and approved by the court of errors and appeals in the recent case of *Knutter v. New York etc. Tel. Co.*, 67 N. J. L. 646, 52 Atl. 565, 58 L. R. A. 808. But, perhaps, the better and more complete answer to the alleged ground of liability on the part of the defendant, by reason of its alleged negligence in connection with the cutting, making and use of the imperfect putlog, may be found in this: That it plainly appears that such negligence, if any, was not the proximate cause of the injury. It was proven by one of the carpenters, who was the plaintiff's witness, that he had been a

carpenter for fifty years; that he was employed upon this work, and, under instructions from the foreman, he cut and prepared putlogs and was so engaged when stopped by the president; that they were pieced in a proper way; that this was often done, but they did it for the prevention of ³⁰³ lateral motion, not for bearing; that the bearing of the short putlog would be one inch without the furring strip; that the pieces were nailed on with eight-penny nails; that they used three or four nails in each piece, which together would stand a strain of eight or nine hundred pounds. This was not contradicted, and there was no evidence tending to show that the pieced putlogs were not reasonably safe for use in any other of the places designated for the putlogs, except the fourth place, where the boards of the two sections of the sheathing joined. It was the improper placing of the one pieced putlog at the point where there would be the greatest strain in the whole panel that was, as it seems to us, the proximate cause of the accident.

This being the situation, the only question remaining is, was the faulty arrangement of the putlogs a breach of any duty that belonged to the master, or was it the fault of a fellow-servant or of the plaintiff himself? The evidence does not show that the master was present or participating in any way in the construction and sheathing of the panels. Under the principles already stated, he had furnished the proper and necessary materials for this work that was in charge of the carpenters and laborers, under the direction of the foreman. He owed them no duty thereafter in the conduct of this work. The only liability that could attach to him for an injury to an employé so engaged would be where it arose from his failure to exercise reasonable care in the employment of a coservant, whose negligence caused the injury. And this is the chief, if not the only, point of attack by the plaintiff in this part of the case. His contention is that the ordinary laborers were directed or permitted to, not only carry the putlogs to the panel in question, but to lay them down in the clips—a duty which belonged to the carpenters, and for which the laborers were incompetent; that, if they had known how to do their work and had been properly instructed, the accident, in all probability, would not have happened. It will be perceived that it is not claimed that the master employed incompetent men, having regard to the particular work required of them, but rather that the ordinary ³⁰⁴ laborers, employed as attendants to wait upon the carpenters, were ordered to do certain acts which, it is alleged, they were

not qualified to perform. The laying down of the putlogs was only the work of a helper, whose duty it was, also, to lay down the boards loosely upon the putlogs, preparatory to the work of the carpenters, whose duty it was to adjust, secure and complete the structure, for which all the appliances and materials had been prepared by them. As before stated, it was the duty of the carpenters to select the putlogs to be carried to the panel, and the case shows that, when the sides of the panel were in place and the putlogs and sheathing boards were laid down, the carpenters proceeded to nail the sides and ends together, to arrange the putlogs so that the fourth should be in place so that the sheathing boards would properly meet upon it. The loose boards upon both sections had to be adjusted, made tight and nailed, so as to prevent any leakage of the concrete. The case shows, and it is apparent from the situation, that, in performing the details of the work thus outlined, the carpenters must have seen the putlogs and the clips containing them. And it was clearly their duty to see that the putlogs were in good condition, suitable in character and properly placed to give the support intended.

But even conceding that the conditions of danger which precipitated the plaintiff's injury grew out of negligence of the coservant, as the result of his incompetency, since it plainly appears that these conditions were known to the plaintiff, or should have been known to him by the exercise of ordinary care before exposing himself to the danger complained of, and yet that, without notice thereof to the master or seeking in any way to remedy these conditions, he continued in the employment which resulted in the injury, he must be held to have assumed the risk as an obvious one, and cannot recover. The principle involved in the proposition is so well established that the citation of authorities will be unnecessary.

An effort has been made by the plaintiff to escape this result of his own negligence and that of his coservants upon ³⁶⁵ the ground that though he was engaged, at the time of his injury, in doing this detail work on or about the panel on the ground that he did not know of the pieced putlogs, and had no knowledge as to who were employed to lay down the putlogs—a work that, some time before the accident, was performed by the carpenters. But the rule which governs, under such circumstances, is this: That servants employed by or under the control of the same master, in a common employment obviously exposing them to injury from the negligence of others

so employed or controlled, although engaged in different departments of the common business, are fellow-servants, who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom: *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324. We think the plaintiff failed to show any actionable negligence of the defendant as causing the injury complained of, and therefore the judgment of nonsuit must be affirmed, with costs.

On Who are Fellow-servants, see the monographic notes to *Fox v. Sandorf*, 67 Am. Dec. 588-597; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 2, 33. Tests for determining the question are given in the recent cases of *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222; *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706, 69 N. E. 988; *Grant v. Keystone Lumber Co.*, 119 Wis. 229, 100 Am. St. Rep. 883, 96 N. W. 535. As to whether a foreman is a vice-principal or a fellow-servant with the employes under him, see the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 613-621, and the recent case of *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep. 706, and cases cited in the cross-reference note thereto.

An Employer Owes to his Employee the duty to provide a reasonably safe place in which to work and reasonably safe tools and appliances: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591-595; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319, and cases cited in the cross-reference note thereto. If an employe is injured by the failure of his employer to furnish him a safe place in which to work, the latter cannot escape liability on the ground that the injury was the result of the negligence of a fellow-servant in constructing an unsafe appliance, for the employer owes a positive obligation to his employe which he cannot avoid by deputing its performance to another employe: *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953. See, too, *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; note to *Mast v. Kern*, 75 Am. St. Rep. 607; and compare *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860; *Channon v. Sanford Co.*, 70 Conn. 573, 66 Am. St. Rep. 133, 40 Atl. 402, 41 L. R. A. 200; *Daugherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757. In this last case it is held that where, as in placing derricks for a temporary use, an employer exercises reasonable care to furnish safe and proper materials and to employ competent and skillful workmen, he has discharged his whole duty, and is not responsible to an employe for the negligent use of the materials.

The Liability of an Employer to his employe for injuries resulting from defective machinery and appliances is the subject of a monographic note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289-325, and the right of recovery by employes accepting hazardous duties is the subject of a monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884-900.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**BRIGGS v. NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.**

[177 N. Y. 59, 69 N. E. 223.]

EVIDENCE.—In an Action for Personal Injuries the evidence of experts as to future consequences which are expected to follow the injury are competent, but to authorize such evidence the apprehended consequences must be such as in the ordinary course of nature are reasonably certain to occur. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating damages, and may not be proved. (p. 721.)

EVIDENCE.—A Medical Expert Should not be Permitted in an action for personal injuries to state numerous things which might result as consequences of the injury, as that it might affect the bladder or kidneys or other organs of the body and in the end become permanent. (p. 721.)

Action for personal injuries. Judgment for the plaintiff based upon the verdict of a jury. On appeal to the appellate division of the supreme court of the fourth judicial district the judgment was affirmed.

Maurice C. Spratt, for the appellant.

Eugene M. Bartlett, for the respondent.

OO O'BRIEN, J. On February 2, 1902, the plaintiff was injured in a collision on the defendant's belt line in Buffalo. It was a cold, stormy night, and a great deal of snow had fallen and drifted. Objects could not be seen very far through the snow and it continued to storm after the plaintiff left the

train. The car in which the plaintiff was seated had the seats arranged so that for a third of the length from either end of the car they were continuous along each side and in the middle third of the car the seats were crosswise. The plaintiff and her aunt sat in the seats crosswise of the car, and after the train had stopped at one of the regular stopping places, and had just got started forward, an engine following in the rear collided with the train by running into the rear end of it. As soon as the headlight was seen approaching, the plaintiff and her aunt got up out of their seats and went forward to the head end of their car. The plaintiff stood there without supporting herself, until the collision occurred, which caused her to sit down involuntarily upon one of the iron arm rests, or divisions, between the individual seats along the side of the car. The collision appears to have been a slight one; nothing was broken about the car except the glass in the front door, and the train started up again and ran on to the next stop in the usual way. The plaintiff and her aunt having reached their destination, got out and walked for some ten minutes through the storm and snow to the home of the aunt. It was Sunday evening and plaintiff stayed there that night and the next day and night, and on Tuesday went home. The plaintiff ⁶¹ then went with her mother to a physician at his office. The testimony tended to show that she went there every day for a week and then every other day for two weeks and then less frequently. It was claimed that the tip end of the spine was injured, resulting in serious consequences. The physician stated that when he first examined her he found a discoloration, not very much discolored, about two inches above the tip of the spine. He did not remember giving any local treatment, but gave her nerve sedatives. The jury rendered a verdict for the plaintiff of six thousand dollars, which has been unanimously affirmed.

The extent of the injury and the damages were sought to be established by the plaintiff largely upon the testimony of medical experts. These experts were conducted by the learned counsel for the plaintiff, in his examination, through a very wide field of speculative inquiry. Much of this testimony appears in the record without exception though it was constantly objected to by defendant's counsel. The testimony was not at all confined to the condition of the plaintiff at the time of the trial, which took place about eight months after the accident, but the experts were permitted to speculate upon the conse-

quences of the alleged injury which might affect the plaintiff in the future. It was suggested that the injury might affect the bladder, the kidneys and other organs of the body and in the end become permanent. The following is a specimen of the testimony given by one of the plaintiff's experts who had seen the plaintiff but once and then long after the accident: "The bladder is a very bad master and a very good servant. If you humor it, or it gets into bad habits, it is almost impossible to correct them. I make this statement more than ordinarily positive, because I have seen a great many of them. Because if this irritability in this child is either from her general nervousness or if it is from some central trouble the result of the blow and the shock she has received, the outcome of it is, in my judgment, permanent. . . . The effects on this child, of this bladder, are of a general effect and local. The general effect of frequent urinating is harassing, ^{as} inasmuch as it interferes with a person's going about. It is a pitiable thing sometimes. . . . The coats become thickened, just as much as a blacksmith's arm becomes larger, the bladder grows so that by and by it don't hold as much water, so that even if it was not sensitive, the person could not retain it and would have to empty it, because it wouldn't retain it any longer. After it has lasted it subjects the person to a long train of evils. A bladder which is enlarged and irritable is liable to have infection and inflammation set in, and when you add inflammation to irritability, you have a condition of affairs that is most serious." The counsel for the defendant here interposed and said: "I object to this kind of testimony. It is of the most general character possible. I have objected to the question, and I want to object now to its being allowed to continue." The plaintiff's counsel thereupon replied: "If there is any part of the evidence that is not responsive, the counsel can move to strike it out, of course." The court thereupon stated: "I will let it stand," and thereupon the defendant's counsel excepted. In response to another question the witness, continuing, stated: "If the condition of the bladder—when that condition of the bladder sets in which I have described, it is only a step further for it to ascend to the kidneys. That always does not take place, but as long as the lower urinary organs are in in that state, there is no question about the jeopardy of the upper urinary organs."

It is, undoubtedly, true that in an action to recover damages for personal injuries the evidence of experts as to the

future consequences which are expected to follow the injury are competent, but to authorize such evidence, however, the apprehended consequences must be such as, in the ordinary course of nature, are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not proper to be considered in estimating the damages and may not be proved: *Strohm v. New York etc. R. R. Co.*, 96 N. Y. 305; *Tozer v. New York etc. R. R. Co.*, 105 N. Y. 617, 11 N. E. 369; *Jewell v. New York etc. R. R. Co.*, ³³ 27 App. Div. 500, 50 N. Y. Supp. 848; *Kleiner v. Third Ave. R. R. Co.*, 162 N. Y. 193, 56 N. E. 479; *Smith v. New York etc. R. R. Co.*, 164 N. Y. 491, 58 N. E. 655. We think this rule of evidence was violated in this case, since the learned trial judge permitted to stand for the consideration of the jury evidence which was speculative and conjectural. Indeed, the medical experts in the case, upon the examination of the plaintiff's counsel, were permitted to state numerous things which might result as a consequence of this injury. This is apparent from the extracts which we have referred to and much more evidence of like character which is to be found in the record; therefore, the learned trial judge, in permitting the examination and in allowing the testimony to go into the record to be considered by the jury, gave the sanction of the court to testimony which was highly speculative and conjectural and so far prejudicial to the defendant as to require a new trial. The objections made and exception taken were sufficient to direct the attention of the court to the point.

The judgment should therefore be reversed and a new trial granted, costs to abide the event.

Parker, C. J., Martin, Cullen and Werner, JJ., concur.

Gray, J., not sitting.

Haight, J., not voting.

Judgment reversed, etc.

The Expert Testimony of a physician in the case of personal injuries must not invade the field of baseless conjecture: *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892, 80 N. W. 944, 47 L. R. A. 691. It may include, however, the probable effect and outcome of the injuries: *Von Pollnitz v. State*, 92 Ga. 16, 44 Am. St. Rep. 72, 18 S. E. 301; *Bliss v. New York etc. R. R. Co.*, 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365; *Griswold v. New York etc. R. R. Co.*, 115 N. Y. 61, 12 Am. St. Rep. 775, 21 N. E. 726; *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584.

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CRANE v. BENNETT.

[177 N. Y. 106, 69 N. E. 274.]

NEWSPAPER LIBEL.—The Proprietor of a Newspaper is Liable for All that Appears in Its Columns, although the publication may have been made in his absence and without his knowledge. (p. 723.)

DAMAGES, EXEMPLARY, for Act of a Servant or Employé.—When the proprietor of a newspaper surrenders to his general manager and employés all his business affairs or the general management of some particular business, and absents himself from the jurisdiction where his paper is edited and published, leaving such manager in entire charge thereof, the proprietor is responsible for the manner in which his business is conducted, and if a libelous publication is wanton, reckless, or heedless of the feelings of the person libeled, and, upon being apprised of the recklessness of the charges, there is a continued refusal to make or publish any retraction, such proprietor is liable for such punitive damages as the jury in its discretion may award. (p. 724.)

JUDICIAL UTTERANCES, Restriction upon Effect of.—In applying cases which have been decided, what may have been said in the opinion should be confined to, and limited by, the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. (p. 726.)

LIBEL—Evidence of Malice.—The falsity of a libel is sufficient evidence of malice. (p. 727.)

LIBEL—Malice—Exemplary Damages.—Though Defendant Testifies and Produces Evidence Tending to Show that there was No Actual Malice, yet if the plaintiff proves the publication of the libel and that it is false, the judge should submit to the jury, as a question of fact, whether malice existed in the publication, and if the jury is of the opinion that it did exist, exemplary damages may be awarded. (p. 729.)

Action for libel. Judgment for plaintiff, which, on appeal to the appellate division of the supreme court in the first judicial district was modified and affirmed. The defendant appealed.

Charles F. Brown, William Jay, Flamen B. Candler and Robert W. Candler, for the appellant.

Eugene Frayer, for the respondent.

108 MARTIN, J. This action was for libel. It was based upon four articles published in the New York "Herald," a newspaper owned by the defendant who resides in France but whose paper is published in the city of New York. Its management was confided solely to persons in his employ who had practical control of the entire business.

The plaintiff was a magistrate in the city of New York. The matter complained of was published in four issues of the defendant's newspaper, and related to alleged flagrant misconduct imputed to the plaintiff in the discharge of his official duties. The articles were published respectively on the twenty-first, twenty-second, twenty-third and twenty-fourth days of August, 1899. The first and each succeeding article related to the same subject and they were all libelous per se. After the publication of the first and of each succeeding one, the plaintiff wrote to the defendant's manager stating that each of the articles was untrue and unjust, and asked that the defendant retract or apologize therefor. Instead of sending or publishing a retraction or apology, another article to the same general effect and relating to the same subject was published, including an editorial. After these repeated requests of the defendant's manager and after writing to the defendant personally upon the subject, stating that the publication of such articles was creating a feeling of distrust and tending ¹⁰⁰ to disgrace him in the eyes of the community, the plaintiff waited until the 13th of the following November, when this action was brought to recover the damages sustained by reason of such publications. That each of the articles published was proved to be false and was libelous per se is not denied, nor is it disputed that their publication was continued from day to day and no retraction made by the defendant or those managing and conducting the publication of his newspaper and the business connected therewith. Obviously there was abundant evidence to justify the jury in finding that the publication of the libels complained of was recklessly and wantonly made and continued, with utter disregard of the rights or feelings of the plaintiff. This brief but general review of the situation is all the statement as to the facts we deem necessary to dispose of the questions of law which are presented upon this appeal.

The defendant contends that as the acts complained of were performed in his absence by his manager and employes, he is not liable for punitive or exemplary damages, inasmuch as there was no proof of personal ill-will or hatred upon his part sufficient to form a basis for the finding of actual malice. That the proprietor of a newspaper is responsible for all that appears in its columns, although the publication may have been made in his absence and without his knowledge, is too well settled to require discussion. His liability is not upon the ground of his being the publisher, but because he is responsible for the acts

of the actual publisher: Townshend on Slander and Libel, sec. 123; Newell on Defamation, Slander and Libel, 377; Odgers on Libel and Slander, 412; Huff v. Bennett, 4 Sand. 120; Andres v. Wells, 7 Johns. 260, 5 Am. Dec. 267. In libel cases, the falsity of the libel being proof of malice sufficient to uphold exemplary damages (a question we shall presently discuss), the right to recover them in the discretion of the jury, rests in the very act done in the publication of the false libel; and whoever is chargeable with that act is chargeable with the legal consequence, which is the right of the jury to redress the wrong by imposing reasonable damages ¹¹⁰ beyond any injury actually shown: Dissenting opinion of Davis, P. J., in *Samuels v. Evening Mail Assn.*, 9 Hun, 288, 294; affirmed, 75 N. Y. 604.

Although a mere servant or agent employed to perform some specific act for a principal may not render the latter absolutely liable for increased damages on account of his motives in performing it, yet, when a principal surrenders to his general manager and employes all his business affairs, or the general management of some particular business, absents himself from the jurisdiction where his paper is edited and published, leaving such manager in entire charge thereof, he is responsible for the manner in which his business is conducted. In other words, a principal surrendering his entire business to another to be conducted for him should be held to the same responsibility he would incur if he himself personally directed it, as to all matters coming within the line of the authority which he has conferred upon such manager or employes. Therefore, while, as was held by the trial court, the defendant might not have been liable for any personal ill-will of his employes or servants against the plaintiff, if there was a willful departure from such business for their private or individual purposes, yet he is responsible for the manner in which the business so delegated was performed by his manager, and if the publication complained of was wanton, reckless or heedless of the rights or feelings of the plaintiff, and upon being apprised of the groundlessness of the charges there was a continued refusal to make or publish any retraction thereof, the defendant was fully responsible for the acts of his general manager, and liable for such punitive damages as the jury, in its discretion, might award. In considering this question we have not regarded it necessary to refer to the cases, relied upon by the learned counsel for the defendant, relating to the question of punitive damages in ordinary actions for negligence, as it is manifest that the rule gov-

erning the question in such actions is totally unlike that which obtains in actions for tort or personal wrong.

Upon the trial the counsel for the defendant submitted to ¹¹¹ the court a great number of requests to charge, some of which were charged, others modified and charged as modified, while others the court refused. To such rulings exceptions were taken by the defendant. Although many of these exceptions were discussed by counsel upon the argument and in their briefs, still the exception to that portion of the charge by which the court instructed the jury "that the falsity of the libel is sufficient evidence of malice to uphold exemplary damages, but the plaintiff's right to recover exemplary damages is in the discretion of the jury," fully presents the only other question we deem it necessary to discuss or decide upon this appeal. Indeed, we should not have regarded it necessary to discuss that question at all but for the fact that there seems to be a misapprehension among some of the members of the profession, and an existing uncertainty on the part of courts as to the effect of the decisions of this court relating to the existing rule upon that subject. The situation seems to have chiefly arisen from our decision in *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317, 56 N. E. 526, or from considering what was said in the opinion in that case without limiting it to the facts involved, rather than what was decided by the court. That was an action against several defendants for the publication of an article libelous per se. Each of the defendants testified he had no malice or ill-will toward the plaintiff, when the latter, in order to show express malice, was permitted to prove against all the defendants that, several years before the publication, one of them, who knew nothing about the article until after it had been published, had made statements expressing ill-will and contempt for the plaintiff, which were never heard by or communicated to the other defendants before the publication complained of, and this court held that a judgment recovered against all must be reversed, as the general malice proved neither caused nor prompted the publication, and that the admission of such evidence presumably affected the verdict. That case was properly decided. In the opinion, however, there are some expressions that may perhaps be regarded as not absolutely accurate because not including certain exceptions ¹¹² or added principles which would be applicable to a case where the circumstances were essentially different. As was said by the learned writer of that opinion in *Colonial City Traction Co.*

v. Kingston City R. R. Co., 154 N. Y. 493, 495, 48 N. E. 900: "It was not our intention to decide any case but the one before us, . . . and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made, by way of argument or otherwise, than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance": Stokes v. Stokes, 155 N. Y. 581, 594, 50 N. E. 342; Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 551, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L. R. A. 478. It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arises as to the effect of a decision will be practically avoided. Construing the Krug case in accordance with the foregoing rule and giving it only the effect suggested, it is manifest that it has in no way affected the doctrine that the proof of the falsity of a libel, of its character and of the circumstances under which it was published, is sufficient to present a question for the jury whether the malice was of such a character as to call for exemplary or punitive damages, and that that question rests with the jury alone.

¹¹³ For a quarter of a century the dissenting opinion in Samuels v. Evening Mail Assn., 9 Hun, 288, seems to have been regarded as containing a correct statement of the principle applicable to the question of punitive damages in actions for libel. In that case the general term reversed the action of the trial court upon the ground that the evidence did not justify the jury in awarding punitive damages and it set aside the verdict on that ground. Davis, P. J., however, dissented, and upon appeal to this court (75 N. Y. 604) the judgment of the gen-

eral term was reversed and that of the trial court affirmed upon the dissenting opinion. The principle established by the decision of this court in that case as stated in the opinion of Davis, P. J., is that "the falsity of the libel was sufficient evidence of malice; . . . the libel being false, the malice imputable from the act of publication is a part of the *res gestae* from which the action arises. . . . The plaintiff in an action of libel gives evidence of malice whenever he proves the falsity of the libel. It becomes, then, a question for the jury whether the malice is of such a character as to call for exemplary or punitive damages; and that question is not to be taken away from the jury because the defendant gives evidence which tends to show that there was, in fact, no actual malice. When he gives no such evidence it is the duty of the court to say to the jury that, upon proof of the falsity of the libel, the plaintiff is entitled to exemplary damages in their discretion: *Tillotson v. Cheetham*, 3 Johns. 56; and see opinion of Kent, C. J., in same case; *Taylor v. Church*, 8 N. Y. 452, where the rule of *Tillotson v. Cheetham* is approved; *Hunt v. Bennett*, 19 N. Y. 173. But where he gives evidence tending to prove the absence of actual malice, then it is the duty of the judge to submit to the jury the question, as one of fact, whether such malice existed in the publication."

That case was cited with approval by this court in *Bergmann v. Jones*, 94 N. Y. 51, 62. It was there held that where a publication is libelous per se, and is proved to be ¹¹⁴ false, this is sufficient evidence to require the submission of the question of malice to the jury, and to warrant the allowance of exemplary damages, although the defendant gives evidence tending to prove no actual malice. Such evidence is to be considered by the jury, and it is for them to determine, in view of all the evidence, whether punitive damages should be allowed or not. Again in *Warner v. Press P. Co.*, 132 N. Y. 181, 184, 30 N. E. 393, the *Samuels* case was followed and it was there said: "The plaintiff gave evidence of malice when she proved the falsity of the libelous publication, and in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion. But testimony was adduced on the part of the defendant, tending to prove the absence of actual malice on its part toward the plaintiff, which taken in connection with the evidence of malice

which the law imputed when the falsity of the libel was established, presented a question of fact whether malice existed in the publication. If found to exist, then, in their discretion, the jury could award exemplary damages." That case was also cited with approval and followed in *Marx v. Press P. Co.*, 134 N. Y. 561, 563, 31 N. E. 918; *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114; affirmed on opinion below, 157 N. Y. 695, 51 N. E. 1094, and *McFadden v. Morning Journal Assn.*, 28 App. Div. 508, 517, 51 N. Y. Supp. 275. In *Gray v. Sampers*, 35 App. Div. 270, 55 N. Y. Supp. 3, the rule stated was that in an action of libel, proof by the plaintiff tending to establish the falsity of the alleged libelous article is evidence of malice, and where it is given a question is presented for the jury whether the malice is of such a character as to call for exemplary or punitive damages, and this question is not taken from the jury because the defendant gives evidence which tends to show that there was in fact no actual malice. That was the rule which was also followed by the learned appellate division in the case at bar (77 App. Div. 102, 79 N. Y. Supp. 66).

In *Smith v. Matthews*, 152 N. Y. 152, 46 N. E. 164, this court held that ¹¹⁵ punitive damages for libel are not limited to cases of actual malice, but may be awarded for a libel recklessly or carelessly published, as well as one induced by personal ill-will. The *Samuels* case was again considered and cited with approval in *Holmes v. Jones*, 121 N. Y. 461, 467, 24 N. E. 701, and it was there said: "So far as the libel was not justified, it was for the jury to determine the amount of the damages to be awarded therefor. If they came to the conclusion from the circumstances and the nature of the charge made, that the publication was malicious, in bad faith, or recklessly, carelessly or wantonly made, they could go beyond compensation and award punitive damages." In the same case, 147 N. Y. 59, 67, 49 Am. St. Rep. 646, 41 N. E. 409, this court said: "But the amount of damages in an action for libel is peculiarly within the province of the jury. The jury may give nominal damages, or damages to a greater or less amount, as they shall determine. The jury may accord damages which are merely compensatory, or damages beyond mere compensation, called punitive or vindictive damages, by way of example or punishment, when in their judgment the defendant was incited by actual malice or acted wantonly or recklessly in making the defamatory charge." In *King v. Root*, 4 Wend. 139, 21 Am. Dec. 102, which was an

action for libel, the court said: "The jury may not only give such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants": See, also, *Cook v. Ellis*, 6 Hill, 466, 41 Am. Dec. 757, and *Tift v. Culver*, 3 Hill, 180. In *Burr v. Burr*, 7 Hill, 207, 218, in discussing this general question, it was said: "If a wanton and malicious outrage is committed upon the civil rights of an individual, it would oftentimes be monstrous injustice to confine the injured party, when seeking for redress, to the actual ascertainable damages he may have sustained. Such a rule would be a license to every species of private wrong; and in most cases of trespass to the person, it would be impossible to apply it with any degree of accuracy."

This examination of the authorities bearing upon the question clearly discloses that the rule of law stated by the trial ¹¹⁶ court was proper and is justified by a long line of decisions in this state. The general rule is that in an action for libel, proof by the plaintiff tending to establish the falsity of the alleged libelous publication is evidence of malice, and if such evidence is introduced, a question for the jury is presented whether the malice is of such a character as to call for punitive damages, and that question is not to be withdrawn from them because the defendant gives evidence which tends to show that there was no actual malice. We think the foregoing rule is well established by the authorities of this state and elsewhere, and that it must be regarded as the true rule, notwithstanding any expression found in other cases where the question was not necessarily involved, which may not be in consonance with it. The doctrine of any such cases will not be followed, but must be regarded as overruled so far as they may be in conflict with this decision.

Moreover, as we have already seen, the jury might well have found, not only that the publications complained of were grossly false, were recklessly and wantonly made in bad faith, but also that after the defendant and his manager were fully informed of their falsity and injustice, they were purposely and willfully continued without apology or retraction of any kind. To paraphrase the language of Chief Judge Nelson in *Hotchkiss v. Oliphant*, 2 Hill, 510, 516, the defendant might have inadvertently published the original article and have been chargeable only with mistake or indifference to the truth, but having been advised of his error and having refused to correct

it, the case rises to one of premeditated wrong, one of determined malignity toward the plaintiff, which should be dealt with accordingly, and there is no longer room for any indulgence toward the defendant's acts, but he becomes a fit subject for exemplary punishment, and the charities of the law give way to such a prostitution of the public press.

Other questions were discussed at the bar, but as they were properly disposed of by the court below and were of no general or great importance, we regard it as unnecessary to continue this opinion by any discussion of them, but will content¹¹⁷ ourselves by concurring in the disposition made of them by the court below.

The judgment of the appellate division should be affirmed, with costs.

Parker, C. J., Gray, O'Brien, Bartlett and Cullen, JJ., concur.

Haight, J., absent.

Judgment affirmed.

WHEN A MASTER OR EMPLOYER IS LIABLE IN EXEMPLARY DAMAGES FOR THE ACT OF HIS EMPLOYEE OR SERVANT.

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This note will be confined to those cases in which exemplary damages were sought against masters or employers who were acting in the capacity of natural persons. The subject as applied to the liability of corporations for exemplary damages for the acts of its employés or servants was treated in the monographic note to the case of *Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 589.

II. General Principles of Law Applicable.

a. Nature of Exemplary Damages.—The right to recover exemplary damages under any circumstances has been frequently assailed on the ground that it violates the constitutional provision prohibiting the placing of a person twice in jeopardy for the same offense; that though in its nature a punishment for the commission of a tort public in character, it does not follow the course of criminal procedure either in pleading or in mode of trial; that in the trial of suits for its recovery the doctrine of preponderance of evidence is substituted for that of reasonable doubt; that the defendant may be compelled to testify against himself; that there is no precise limit to the amount of such damages which may be allowed by the jury; that the pardoning power of the executive cannot be exercised; that, in short, in all its features it is a sin against judicial principles; but notwithstanding the arguments which have been urged against it, the rule allowing such damages is firmly fixed in most of the states. Its regulation has been, however, provided for by statute in some of the states. It perhaps would accord more with judicial principles if, in the allowance of exemplary damages, the award were confined more strictly to such cases in which the tort has caused mental anguish and humiliation to the injured person through a contemplation of the violation of his natural civil rights as a citizen and member of the community. It seems to us that there are classes of cases, such as oppressive abuse of civil remedies and wanton acts of libel in which the assessment of damages as compensation could not be easily ascertained, and that in such cases it would be proper to assess the damages in the same manner in which acts of alleged cruelty are considered in divorce cases, viz., by considering whether the acts alleged constitute cruelty in the particular

case when considered in connection with the status and social condition of the parties involved, for the courts draw such a distinction when they hold that acts which might be deemed extreme cruelty toward a woman of refinement and culture might not be so deemed as against a woman fishmonger.

The definition given by Mr. Joyce in his work on Damages, section 28, is perhaps in accord with the general view held by the courts as to what constitutes exemplary damages, he says: "Punitive, vindictive or exemplary damages are those in excess of the actual loss, not intended as a compensation, but rather designed as a punishment for the grossly negligent, wanton or malicious conduct, act or evil motive of one person toward another as a result of which the latter has sustained some injury, loss or damage." The nature of such damages was stated in the recent case of *Boydan v. Haberstumpf*, 129 Mich. 140, 88 N. W. 386, which was a suit under the statute for an illegal sale of liquor to plaintiff's husband, as follows: "The statute expressly authorizes exemplary damages in this class of cases. But 'exemplary damages,' as the term has been employed in this state, has generally been understood to mean an increased award of damages in view of the supposed aggravation of the injury to the feelings by the wanton or reckless act of the defendant. As was said in *Ford v. Cheever*, 105 Mich. 685, 63 N. W. 976: 'It has never been the policy of the court to permit juries to award capitionally any sum which may appear just to them, by way of punishment to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a just measure of compensation for injury to feelings in view of the circumstances of each particular case.'

"We think it should not be permitted that a jury be given leave to award damages as 'smart money,' or 'in the way of punishment, to make an example for the public good.'"

Thus we see that the Michigan case, just quoted from, places such damages in the light of compensation for injured feelings rather than by way of punishment. This view, which may be more readily reconciled with judicial principles than that based entirely on punishment, was also stated in *Ralston v. The State Rights, Crabbe* (U. S.), 47, Fed. Cas. No. 11,540, where the court said: "The damages which are called exemplary are nothing more than a high and exaggerated estimate of the wrong or injury, which the courts and juries take upon themselves to allow, bringing into calculation, not a new and distinct injury, but something beyond the mere pecuniary loss or personal suffering, still belonging, however, to the original wrong and to no other."

In *Craven v. Bloomingdale*, 171 N. Y. 442, 64 N. E. 169, which is perhaps representative of the weight of authority, the basis of exemplary damages is distinctly based on the theory of punishment, and not on the difficulty of estimating the damages in certain kinds of torts. In that case, the court approved the rule laid down by Judge

Andrews in *Voltz v. Blackmar*, 64 N. Y. 440, wherein he said: "In punitive actions, as they are sometimes termed, such as libel, assault and battery and false imprisonment, the conduct and motive of the defendant is open to inquiry with a view to the assessment of damages; and if the defendant, in committing the wrong complained of, acted recklessly or willfully or maliciously with a design to oppress or injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation and beyond that may, as a punishment to the defendant and as a protection to society against the violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. The same rule has been held to apply in the case of willful injury to property and in actions of tort founded upon negligence amounting to misconduct and recklessness"; citing *Tillotson v. Cheetham*, 3 Johns. 56, 3 Am. Dec. 459; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102; *Tift v. Culver*, 3 Hill, 180; *Cook v. Ellis*, 6 Hill, 466, 41 Am. Dec. 757; *Burr v. Burr*, 7 Hill, 207; *Taylor v. Church*, 8 N. Y. 460; *Hunt v. Bennett*, 19 N. Y. 173; *Millard v. Brown*, 35 N. Y. 297. For a further discussion of the right to recover exemplary damages, see the monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870.

b. *Employés for Whose Acts Master is Liable.*—In this note we shall only treat of the liabilities of the master or employer arising from the relation of master and servant, and shall not discuss the cases based strictly on the relation of principal and agent, although the general principles applicable to the latter are very similar.

A servant has been defined as one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter: *Heygood v. State*, 59 Ala. 51; *Gravatt v. State*, 25 Ohio St. 168; while an agent is a person duly authorized to act on behalf of another. The basic theory of the liability of the master or employer for the acts of his servant or employé is that the former has the control and direction of the work in hand not only in its ultimate results but in the manner of how it should be performed. This right to control the servant or employé implies also the power to discharge him from the service or employment for disobedience. Hence the basis of the liability of the master or employer is the maxim, "respondeat superior." The decisions very often use the term "agent" as synonymous with "servant" in discussing the liability of the master for acts of persons in his employ who are generally known or described as servants.

The liability of the master arises from the relation itself, and as far as the public is concerned does not depend upon the particular stipulations which he may have with the servant. In *Ward v. Young*, 42 Ark. 552, a trusted convict was placed by the lessee of the penitentiary, who, as such lessee, had charge of all the convicts, in charge

of his premises with orders to protect them from trespassers. He assaulted and wounded a boy who was lawfully on the premises, and exemplary damages were awarded against the lessee. It was questioned whether the relation of master and servant existed. The court in holding that the relation existed, said: "Now, although the relation of master and servant springs out of a contract, yet as to third persons it can make no difference that Ward hired the services of this convict from the state. The servant may be a minor and the contract be with his parent. The master's liability, if any, arises from the relation itself, and does not depend on the nature of the stipulations in his contract. 'If one is injured by the servant of another, and the injury is in any manner connected with the fact of service, it would be immaterial to the injured party what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection'"; citing Cooley on Torts, p. 532; Wood's Master and Servant, secs. 4, 7.

In *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. 511, it was sought to apply the relation of master and servant in a suit against a husband and wife sued jointly for an assault and battery committed by the wife. The husband had used his best efforts to prevent the assault. The court in sustaining a judgment for exemplary damages drew a distinction between the master and servant cases, and said that the husband was liable, "not as master, but as husband, and because of the oneness of the twain in the eyes of the law." It seems to us, however, that the authority of the wife to bind her husband by her contracts is based upon the theory that it is by virtue of an authority derived from him and founded upon his consent, and not by any inherent power from the mere fact of the marital relation: See the authorities cited in the monographic note to *Wanamaker v. Weaver*, 98 Am. St. Rep. 627, on the implied authority of wife to act for husband and charge him for necessities.

c. **Distinction Between Corporations and Natural Persons as Masters.**—Some of the older cases drew or tacitly proceeded upon the theory that there was a real distinction between the liability of a corporation and that of a natural person to exemplary damages for the acts of their servants or employes, but the more modern cases hold that a corporation is liable to the same extent to which an individual master would be liable. The distinction was based on the idea that a corporation must act through servants and agents, whereas the natural person, being a conscious being, need not do so, but if he did so, he could direct and control their acts and their manner of performing such acts, the liability of the corporation in such cases being based on the theory of principal and agent, while the liability of the natural person was based on the relation of master and servant. In *Kutner v. Fargo*, 20 Misc. Rep. (N. Y.) 207, 45 N.

Y. Supp. 753, the court said: "The decisions in this country upon the question of the liability of a corporation in exemplary damages for the willful or malicious acts of its agents are divided into three classes. One holds the corporation never liable; another holds the corporation liable if the wrongful act done by a servant acting within the scope of his authority; a third recognizes the liability if the wrongful act was within the scope of the employment and was previously authorized or subsequently ratified by the corporation. The New York decisions and those of the United States supreme court seem to incline to the third class: *Lake Shore etc. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261, 37 L. ed. 97; *Cleghorn v. New York Cent. etc. R. R. Co.*, 56 N. Y. 47, 299, 15 Am. Rep. 375; *Caldwell v. New Jersey S. Co.*, 47 N. Y. 282; *The Amiable Nancy*, 3 Wheat. 546. A note upon these cases will be found in 62 Am. Dec. 379." So, also, in *Central Ry. v. Brown*, 113 Ga. 415, 84 Am. St. Rep. 250, 38 S. E. 989, the court stated that it was originally thought that a corporation being created for lawful purposes could not do anything unlawful, and hence that whenever its servants exceeded the charter authority by doing an unlawful act that they necessarily committed the act as individuals and not as representatives of the corporation, but that now it is almost universally held that a corporation is answerable for the torts of its servants to the same extent and under the same circumstances as an individual master would be. So, also, in *Dinsmoor v. Wolber*, 85 Ill. App. 157, the court, after citing various cases in which the rule was laid down, said: "It is true that the above cases all involved actions of railroad corporations for injuries alleged to have been caused by their servants, but the rule adopted appears to apply with equal force to cases involving the liability of natural persons under like circumstances."

d. **Necessity for Acts to be Willful, Wanton, Malicious, Reckless or Grossly Negligent.**—Mr. Justice Cooley, in *Kreiter v. Nichols*, 28 Mich. 498, stated the rule as to when a master could be mulcted in exemplary damages for the acts of his servants, in the following language: "We also think the court erred in refusing to instruct the jury that exemplary damages should not be awarded, unless the act of giving or selling intoxicating drinks to the husband of the plaintiff was willful. The term 'exemplary damages,' or, as it is sometimes phrased, 'punitive or vindictive damages,' is often very loosely employed in the books, and the controversy over the doctrine which permits the allowance of such damages has been very able and very persistent. But those who go farthest in support of such damages base the right to award them expressly on the willful or wanton conduct of the defendant—the moral turpitude or atrocity of the act, which renders it proper that damages by way of punishment should be inflicted beyond what could be measured by compensation. Thus Mr. Sedgwick says: 'The general prin-

ciple that in case of willful wrong committed by the defendant, the jury have a large discretion to award damages by way of punishment has been asserted in a number of cases': Sedgwick on Damages, 454, note. Mr. Justice Grier says: 'It is a well-established principle of the common law that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff.' And again: 'In actions of trespass where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called smart-money': Day v. Woodworth, 13 How. (U. S.) 368, 14 L. ed. 181. And in the leading case of Huckle v. Money, 2 Wils. 205, Lord Chief Justice Pratt expressed the opinion that the jury had done right in awarding exemplary damages for a trespass committed by direction of the crown officers, and the legality of which they had endeavored to support and maintain in a tyrannical and severe manner. These extracts sufficiently indicate the grounds on which such damages are allowed, and show that they are not to be awarded unless the conduct of the defendant is willful, wanton, reckless or otherwise deserving the punishment beyond what the requirement of mere compensation would impose." So, also, in Hawes v. Knowles, 114 Mass. 519, 19 Am. St. Rep. 583, it was said: "In an action of tort for a willful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for when the merely physical injury is the same, it may be more aggravated in its effects upon the mind, if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness"; citing Stowe v. Heygood, 7 Allen, 118, and Smith v. Holcomb, 99 Mass. 552. And in Cosgriff v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206, a very recent case which involved wanton acts of trespass on the part of defendant's servants, the court stated the rule in the following language: "The general rule, where the doctrine is recognized, is that where malice, fraud or gross negligence or recklessness enters into the commission of a tort or where the act is done wantonly, exemplary damages are recoverable": See, also, Kirton v. North Chicago St. R. Co., 91 Ill. App. 554, to the same effect.

In Trauerman v. Lippincott, 39 Mo. App. 488, the court defined wanton acts as follows: "If one intentionally does a wrongful act and knows at the time that it is wrongful, then he does it wantonly; by the word I understand is meant causelessly, without restraint and in reckless disregard of the rights of others. When one intentionally commits a wrong, he does it from an evil spirit and had

motive. Good motive or spirit does not impel the commission of willful wrongs."

In *Hansford v. Payne*, 11 Bush (Ky.), 380, which was a suit by the personal representative of the deceased "for the wrongs, injuries and damages done him" by substituting croton oil instead of linseed oil in a prescription, the court held that "willful" and "gross" were not synonymous terms when applied to negligence.

e. Necessity for Act to be Authorized or Within Scope of Employment.—In the early cases it was held that the master was only chargeable where the injury was caused by the servant's negligence and unskillfulness in the discharge of his master's business, and not where the servant's act was intentionally wrongful and willful, but the latter cases place the liability upon the master if the act was done while the servant was engaged in the master's business and acting within the scope of his employment, regardless of the actual intent of the servant in doing the act.

In *Dinsmoor v. Wolber*, 85 Ill. App. 156, the court remarked that the authorities were not harmonious in regard to the question, but that the courts of Illinois had substantially adopted the rule laid down in *Wood on Master and Servant*, section 323, wherein he said: "It may be regarded as settled by the better class of cases that whenever exemplary damages would be recoverable if the act had been done by the master himself, they were equally recoverable when the act was done by his servant": See, also, monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71, on acts of servants for which master is not responsible.

Thus we see that the test of whether the master or employer can be held liable for the willful, wanton or malicious acts of his servants or employes, either in actual or in exemplary damages, is dependent upon whether the act complained of was within the scope of the servant's employment. The authority to do a particular act may be implied if the act is within the scope of the employment or in furtherance of the business of the master. As we have seen, the responsibility of the master is based not only on his power to select the servant or agent, but to direct the mode of executing the work and controlling his acts in the course of the employment so as to prevent injury to others: *Robinson v. Webb*, 11 Bush (Ky.), 475. The rule in that respect was stated in *Ward v. Young*, 42 Ark. 553, by setting forth the rule set out in *Cooley on Torts*, page 538: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper or under the influence of passion aroused by the circumstance or the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." See *Kreiter v. Nichols*, 28 Mich. 492, to the same effect.

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It often, however, becomes quite a difficult question to determine whether the act in controversy was within the scope of the servant's employment or not. In *Mali v. Lord*, 39 N. Y. 384, 100 Am. Dec. 448, a leading case on the subject, the action arose over the defendant's superintendent and clerk compelling the plaintiff to be searched on suspicion of having stolen some goods from defendant's store, the court said: "It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor. If not responsible, if the superintendent acted in good faith in the belief of the plaintiff's guilt, they clearly would not be, if he acted from malice, in the absence of such belief." In *Knowles v. Bullene*, 71 Mo. App. 349, the court in answer to the argument, based on *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448, that if defendants could not have lawfully arrested the plaintiff (she being innocent) that their agents or servants had no authority to do so, admitted that the case cited was authority for defendant's contention, but said: "When it is said that no authority will be implied in the agent to do an act the principal himself could not lawfully do, if present, it must be understood as having relation rather to the character of the act than as to what the principal might have lawfully done under the particular circumstances of the case. To illustrate: The master would have no authority, if present, to shoot and kill one detected in stealing his goods, and so under the rule, correctly applied, no such authority could be implied in the servant. But the master may lawfully arrest and detain the thief and thereby force him to give up the stolen goods and authority therefor may be impliedly given to the servant or agent standing in the place of the principal."

It seems to us that where the servant has the discretion to determine what should be done, that the master ought to be liable for his misjudgment, although he may have done an act which the master would not have been authorized to do; for instance, the act of a conductor in ejecting an orderly passenger who has a valid ticket would be unauthorized if done by the master, but it would not be contended that the conductor was not placed there for the purpose of deciding when such an act was necessary and proper, and that the carrier would be bound by his acts in that respect. The rule as to when an act of the servant, though done in the service, is within or without the course of that service is very clearly set forth in *Me-*

Clung v. Dearborne, 134 Pa. St. 406, 19 Am. St. Rep. 708, 19 Atl. 698, 8 L. R. A. 204, wherein it was said: "The general doctrine laid down by the learned judge that every man is liable for his own trespass only must not be taken too literally; for one must be held to do that which he procures or directs another to do for him, as well as that which he does in his own person. *Qui facit per alium, facit per se*. Servants and employes are often without the means to respond in damages for the injuries they may inflict on others by the ignorant, negligent or wanton manner in which they conduct the business of their employer. The loss must be borne in such cases by the innocent sufferer, or by him whose employment of an ignorant, careless or wanton servant has been the occasion of the injury, and under such circumstances it is just that the latter should bear the loss. But the master is not liable for the independent trespass of his servant. If a coachman, while driving along the street with his master's carriage, sees one against whom he bears ill-will at the side of the street and leaves the box to seek out and assault him, the master would not be liable. Such an act would be the willful and independent act of the coachman. It was done while in his master's service but not in the course of that service. But if the coachman sees his enemy sitting on the box of another carriage driving along the same highway, and he so guides his own team as to bring the carriages into collision, whereby injury is done, the master is liable. The coachman was hired to drive his master's horse. He was doing the work he was employed to do, and for the manner of his doing it, the master is liable: *Wood on Master and Servant*, sec. 277. It would be no defense to the master to prove that he had given his coachman orders to be careful and not drive against others. It was his duty not only to give such orders but to see that they were obeyed. It will be seen, therefore, that it is the character of the employment and not the private instructions given by the master to his servant that must determine the measure of his liability in any given case."

f. *When Act of Servant Must be Ratified.*—It seems to us that if the act of the servant is within the scope of the employment that no ratification of the act on the part of the master is necessary in order to make the master responsible therefor. But when the act is one which the master could have done, but was not within the scope of the servant's employment, it would be necessary to show that the master ratified it in order to hold the latter liable, but in such case the liability would really be based on the principle of the liability of a principal for the acts of his agent. An illustrative case may be found in *Cobb v. Simon*, 119 Wis. 606, 100 Am. St. Rep. 909, 97 N. W. 276, wherein the floor-walker of defendant, who conducted a large department store, unlawfully searched plaintiff, after having accused her of shoplifting, and also extorted money from her for not sending her to the police station. In discussing the question

whether the defendant ratified the acts of his floor-walker, the court said: "Retention of a servant in his employment after notice to the principal of a tort committed by the servant is evidence of ratification of the act by the principal: *Bass v. Chicago etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Robinson v. Superior Rapid T. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961, 34 L. R. A. 205. The information to the principal should be full and complete, in order to justify the conclusion of ratification on this ground: *Patry v. Chicago etc. R. Co.*, 77 Wis. 218, 46 N. W. 56. It is not essential that the information should come from the plaintiff, but however it comes, it should be more than a mere idle rumor and should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. Any other rule would necessitate the discharge of faithful employes whenever their conduct is assailed by irresponsible, unfounded gossip, and such a rule would be plainly unjust both to employer and employé. The question is generally one for the jury in view of all information which came to the employer, and was such in the present case, under proper instructions."

III. Torts Affecting Personal Rights.

a. *Interference with Funeral Cortège.*—Exemplary damages were sought for the withdrawal of a hearse and accompanying carriage from a funeral cortège in the case of *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 17, 81 N. W. 1003, 49 L. R. A. 475. Though the action was based on a conspiracy, still the overt acts producing the injuries were done by the driver of one of the defendants. The facts in the case were as follows: The plaintiff employed and paid one Schubert, a liveryman, for the services of a hearse and carriage for use at the funeral of his child which was to be buried from his residence. The hearse and carriage were sent to plaintiff's residence and were standing in front of plaintiff's residence awaiting the termination of the funeral services. Just as the funeral services were over and the coffin containing the child's remains was about to be placed in the hearse, the drivers of the hearse and carriage drove away, leaving the plaintiff and his large number of friends, who were present, to resort to such means as they could to continue the funeral and without giving plaintiff any explanation as to the cause of their driving away. It appears that there was a liverymen's association, of which the defendant Schubert was a member, and of which the defendant Buening, was the secretary; that according to the by-laws of said association no member thereof was allowed to do business with any person who did not patronize its members exclusively, or to let a hearse to a private party for a funeral where the undertaker in charge of such funeral was reputed to patronize nonunion members, or to any person whose family, for the occasion, patronized a nonunion livery; that the undertaker, being authorized

to engage the hearse and carriage, engaged it in plaintiff's name without the defendant, Schubert, knowing that the undertaker was in any way connected with the transaction, the engagement having been made with one of Schubert's employes, but that Schubert, fearing that the transactions might lead to a violation of the rules of the association, directed the driver of the hearse not to remain at the funeral if a nonunion man was in charge; that after the hearse and carriage had left his barn to attend the funeral, the defendant Buening was informed of the facts, and particularly as to who was the undertaker in charge of the funeral, whereupon Buening, claiming to act in pursuance of his duty as secretary of the association, communicated with Schubert's barn, giving notice of the proposed violation of the association's rules, and requesting Schubert or some one in his barn to cause the driver of the hearse to communicate with the barn by telephone; that Buening then went to plaintiff's residence and stated to the driver of the hearse that his employer wanted to talk with him over the telephone; that the driver then drove a short distance from plaintiff's residence, but there was a conflict in the evidence as to whether he telephoned as requested; that there was some evidence that he told Buening there was no need to telephone, that he had previously received orders to return in case the undertaker mentioned was in charge of the funeral arrangements; there was also evidence to the effect that when Buening visited plaintiff's residence he ordered the driver of the hearse to return to the barn, and said to the undertaker: "I am secretary of the union and authorized to have the hearse go home. I am not going to leave before the hearse goes away. I am going to break up this funeral. I am not going to have this thing go on, and this hearse has got to go home"; that Buening's conduct at the affair was such as to attract the attention of the persons present, and that when the drivers returned to the barn, he said to the undertaker: "You see what I can do!" There was also evidence of ratification on the part of Schubert as to all that had been done. At the trial the defendants requested the court to direct a special verdict pursuant to the Wisconsin statute, which was refused. The appellate court, after stating the arguments used on that proposition, said: "It follows that the denial of the motion for a special verdict was wrong solely on the ground of the reason assigned for it. It was useless to require the jury, as did the court, to say whether defendants, or either of them, participated in depriving plaintiff of the use of the hearse, because Schubert said he instructed his driver to return to the barn if a nonunion man was in charge of the funeral, and that he gave such instructions in conformity to his obligations to the union. The evidence was all one way that Buening was the moving spirit in causing the driver of the hearse to obey the instructions of his master, and that his acts were in accord with his duties as secretary of the union, and in conformity to a request made of him, either by Schu-

bert himself or by some one in his behalf, whose acts Schubert fully ratified with knowledge of all the facts. Such ratification rendered Schubert liable for actual and exemplary damages the same in all respects as if he had originally authorized Buening to act in his behalf: *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961, 34 L. R. A. 205. There was perfect concert of action between all the parties concerned in the transaction to deprive plaintiff of the use of the hearse, and the acts of each and all were in accord with the agreement between the members of the union.

"The court needlessly required the jury to say whether facts existed warranting an assessment of exemplary damages. It was sufficient that they were instructed that the assessment of such damages was discretionary with them.

"It was correctly said by the court, in substance, before the formal charge was given, that the acts of the defendants were willful and with intent to deprive plaintiff of the use of the hearse at a time when they knew it would be impossible to supply another. As men of common sense, defendants must have known that their conduct would greatly shock the sensibilities of the plaintiff, would humiliate and cause him great mental confusion, pain and suffering. No reasonable conclusion could be arrived at from the evidence, other than that the defendants intentionally carried out their unlawful design under such circumstances as to demonstrate the power of the combination to punish liverymen for doing business in an independent way, and persons for dealing with such nonunion liverymen; that with such ends in view they proceeded with reckless disregard of consequences and with full knowledge of the inevitable result to plaintiff. All the elements of fact warranting exemplary damages appear clearly from the evidence as matters of law. There was the willful violation of plaintiff's rights, inflicted under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice": Citing *McWilliams v. Bragg*, 3 Wis. 424, and *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342.

Though the acts giving rise to the award of exemplary damages in this case were performed by the drivers of the hearse and carriage, who were in the immediate employ of the defendant, Schubert, still it does not appear that they were done by the drivers on their own initiative, and the court seems to base its decision more upon the propositions that Schubert had specifically directed the drivers to return in case a nonunion undertaker was in charge of the funeral arrangements, or that, if he had not originally so instructed the drivers, that Buening, the secretary of the union, acted as his agent for that purpose and that he ratified Buening's acts as such agent. Hence we cannot say that this case would be an authority for acts of that nature performed voluntarily by hearse and carriage drivers under similar circumstances, and we refer to the case merely to raise

the question whether acts of that sort by employes of a liveryman, or undertaker, would be considered as within the scope of their employment in view of the prevalence of labor and similar associations, and the widespread knowledge of their rules and methods of enforcing their rules.

b. *Offering of Insults and Indignities to Customer.*—The duty of a merchant to his customer was discussed in the case of *Cobb v. Simon*, 119 Wis. 604, 97 N. W. 276, 100 Am. St. Rep. 909, which was a case wherein defendant's floor-walker attempted to extort money from a customer whom he had accused of shoplifting. In that case the correctness of an instruction that "a master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured, was questioned. The court in discussing the proposition admitted that it would be applicable in the case of an assault upon a passenger by the servant of a common carrier because of the carrier's duty to the passenger in such a case, but said: "It has not, however, been applied to a merchant in his relations to customers. It is true that customers in such a case are upon the premises by invitation, and the merchant owes the positive duty to the customer of using care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants, but we do not understand that he insures the customer personal safety. We have been referred to no cases so holding." The court then held the instruction not applicable to the case at bar. The taking off of a garment which a customer was trying on accompanied by insulting accusations was held to constitute an assault in *Geraty v. Stern*, 30 Hun, 427. In that case, the plaintiff had gone into defendant's department store to purchase an ulster for herself. While she had an ulster on her person preparatory to its purchase, the floor-walker approached her, telling her that she did not want to purchase the garment and using language indicating that she was a spy from a rival house, and directed the saleswoman to take the garment off from her, which was done. The court, in holding that the affair constituted an assault and that the act was in furtherance of defendant's business, said: "In this case there can be no claim that the employes of the defendant were prompted by malicious motives or selfish aims. Their action was in their line of duty as they understood it. The duty to act was cast on them, then and there. Their instructions were not to show styles or give prices to persons who came from other stores to look at styles or obtain prices. Here an emergency arose when such a case was presented as the employes believed and the duty of deciding was imposed on them. They may have decided unwisely, but their decision and action was clearly within the line of their duty, and the defendants are responsible for

the resulting consequences. It was for no selfish purpose that they submitted the plaintiff to indignity but to serve the defendants only, and they devolved the duty of carrying out their instructions on their employes. They must be held responsible for the manner in which it is done; no other rule would meet the requirements of public policy or public convenience."

c. False Imprisonment or Illegal Search.

1. In General.—The rule as to under what circumstances a servant may make his master liable in exemplary damages for the detention or arrest of a person for some offense having relevancy to the master's property or business was set forth in *Markley v. Snow*, 207 Pa. St. 459, 56 Atl. 999. The court in that case stated the true rule to be that set forth by Blackburn, J., in *Allen v. London etc. Ry. Co.*, L. R. 6 Q. B. 65, wherein it was said: "There is a marked distinction between acts done for the purpose of protecting property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person whom he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property, it is done merely for the purpose of vindicating justice."

It seems to us that the above is the proper rule in such cases. The question arises most frequently in suits for false imprisonment and illegal search on suspicion of being a shoplifter and the rule is sometimes not strictly applied. Those classes of cases will be treated in the next section. It seems to us, however, that in those cases in which the rule above set forth has not been strictly applied may be distinguished on the ground that the person making the arrest or conducting the search was an agent for that very purpose, such as the agents and employes of detective agencies and the detectives or special police officers of large department stores. This theory is, we think, illustrated by the case of *Pinkerton v. Martin*, 82 Ill. App. 589, wherein the appellee was arrested by the servants and agents of appellant, who conducted a large detective agency at Chicago, under a charge of arson, and then placed in appellant's "sweat-box" to extort from him his supposed knowledge as to who were the really guilty parties. In appellee's suit for false imprisonment the court said: "It is argued that there is no proof of express malice or want of probable cause. We think the authorities cited by counsel on this question are not in point and have no bearing when applied to the facts of this case. Here the arrest and detention were in themselves unlawful. Appellee was decoyed into Chicago upon false pretenses, then illegally arrested and unlawfully confined for two weeks, being denied all communications with his friends or the outside world,

and with no attempt whatever to have a legal investigation as to his guilt of any crime. Under these circumstances the law implies malice and probable cause would furnish no justification. This proposition is elementary, and it is scarcely necessary to cite authorities in its support: *Johnson v. Von Kettler*, 84 Ill. 315." No question was raised as to the acts of the agents or servants of appellant being outside the scope of their employment. Another like case was that of *Clark v. Starin*, 47 Hun, 345, wherein the defendant, who was the owner of an island used as a summer resort, had an agreement with one Pinkerton to furnish him a number of special police officers for use on this island. His son, who was in charge of the resort, together with one of these special officers, arrested the plaintiff, who was a ticket-taker at the resort, for the larceny of some tickets. The court held that the defendant was liable for the false arrest. See, also, *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169, discussed in the last subdivision of this note.

2. On Suspicion of Being a Shoplifter.—It is difficult to lay down any general rule as to the liability for exemplary damages for the acts of servants in arresting or searching an innocent person suspected of having stolen goods while shopping.

In an early case in New York, that of *Mali v. Lord*, 39 N. Y. 384, 100 Am. Dec. 448, the court in holding that the searching of a suspected shoplifter was not within the scope of the master's employes, after stating the general principles regarding the responsibility of the master for the acts of his servants, said: "Applying these principles to the present case, the inquiry is whether a merchant by employing a clerk to sell goods for him in his absence, or a superintendent to take general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain and search anyone suspected of having stolen and secreted about his person any of the goods kept in such store. If he does, he is responsible for such acts of the clerk or superintendent. If not, then such acts are not within the scope of the authority delegated to the superintendent, and the employer is not responsible therefor, for the reason that, while in their performance, the servant is not engaged in the business of the master, any more than in committing an assault upon or slandering a customer. In examining this question it must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against thieves and marauders; and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present.

The master would not, if present, be justified in arresting, detaining and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor. If not responsible if the superintendent acted in good faith in the belief of the plaintiff's guilt, they clearly would not be if he acted from malice, in the absence of such belief."

The *Mali v. Ford* case was followed in *Mallach v. Ridley*, 43 Hun, 336, under a very similar state of facts, the floor-walker in the latter case having informed a policeman that a salesgirl had seen plaintiff steal a corset and conceal it on her person, and upon the policeman bringing the plaintiff back to the store, directed that she be searched. The trial court had charged that if the floor-walker had done these acts on the supposition that he was in the exercise of his duty of protecting his employer's goods, the employer would be responsible for his acts; "that they had placed him there to do that act and for any act of his in doing what he supposed was his duty in detecting thefts or in suppressing thefts or in arresting thieves, if he was mistaken in his judgment in that respect, the defendants are responsible. They are not only responsible for that, but for any excess of authority, or any excess in his action in regard to that." But the appellate department held that the trial judge had erred in so charging on the ground that it made the liability of the defendants depend upon the supposition of his servant as to the extent of his authority, instead of upon the authority actually conferred or implied.

It seems to us, however, that the doctrine enunciated by the trial judge is sounder in principle. It also seems to us that in those cases of suspected shoplifting arising in large department stores or other large stores where the floor-walkers are charged with the duty of watching customers to prevent the purloining of merchandise, or where the proprietor has special policemen or detectives for that purpose, that the employer would be responsible for the manner in which they perform their duty. This view is sustained by the case of *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 633. In that case a lady customer asked the salesgirl at defendant's store to show her some watches. The girl showed her some which were very bright in color, whereupon plaintiff asked her if she had not some more subdued in character. The girl said "No," and counted the watches in the tray and said that there was one missing. The plaintiff remarked, saying, "Well, probably you have sold the watch," not thinking that she was accused of stealing it. The salesgirl sent for the floor-walker and he sent for the woman detective, who said, "You will have to be searched." The detective then sent for a man and they, placing plaintiff between them, took her through the store to the elevator,

whence they went into a room where plaintiff was searched. The defendant claimed that plaintiff asked to be searched for the purpose of clearing herself from suspicion, and that no restraint whatever was placed upon plaintiff by any of his employes. From the detailed statement of the facts it will be seen that the defendant had instituted a system of espionage at his store and that the acts of all his employes were done in pursuance of that system. The court said: "It seems to us, when we consider the situation of the plaintiff, that she was in the store of the defendant surrounded by persons who were employed by the defendant to detect crime, substantially accused of being a thief, and with the statement made to her, 'You will have to be searched,' that this was the exercise of such a dominion over her that the jury might very properly find that restraint was exercised, and that the subsequent proceedings were simply carrying out the threat that they would search her. Under such circumstances the plaintiff certainly was not required to offer physical resistance to this unjustifiable proceeding against her. The jury having resolved that question in her favor, there seems to be no ground whatever for this court to interfere. The authority of the employes of the defendant is established beyond peradventure by the testimony of the defendant himself. These were the agencies employed by him for the protection of his property; and these people, in the proceedings taken by them, were acting clearly within the scope of the authority which had been conferred upon them."

It was questioned whether the court should have submitted the question of malice to the jury. The appellate court, in answer to that question, said: "The law imputes malice to an unlawful act. There is undoubtedly a difference between malice which the law infers from the act itself and malice which is the product of a proved mental operation. The court had the right to submit the question of malice in this case. From the very grossness of the act itself, malice may be inferred. Here, without the slightest evidence that this plaintiff was in any way connected with the disappearance of the watch in question, it is proclaimed to her that she must be searched; in other words, she will have to submit to a search. And surrounded as she was by the servants of the defendant, possessing authority to act, she submits. It is clear that from an act of this kind the jury might infer legal malice."

And continuing, the court in holding that punitive damages could be awarded, said: "It is further urged that there was no ground for awarding punitive damages; in other words, that there was no express malice proved, and therefore no foundation for punitive damages. It will be seen, when we consider the nature of punitive damages, that the case falls within the rule permitting them to be awarded. Punitive damages are given, not only as a punishment to the defendant for a wrongful act, but also as a warning to others. Although there was no evidence of any express malice against the

plaintiff individually, the act was done in pursuance of a system which had been adopted in that store; and if this system was such as to place an innocent customer in the position in which the plaintiff's evidence shows that she was placed, the jury had the right to say that the results of this system were of such a character as to require rebuke by way of punitive damages in order that innocent people should not be placed in the position which this plaintiff was placed without any fault upon her part."

In *Hershey v. O'Neill*, 36 Fed. 168, the plaintiff, who was a stranger in the city, went into defendant's department store and while there took, without asking permission, an umbrella a distance of about forty feet away to look at it, though the umbrella counter was in the lightest part of the store. It was also claimed that she had reached the sidewalk when she was politely accosted by a salesman and requested to return to the store, which she did voluntarily. She was arrested by a police officer at the request of the salesman. The court held that a verdict in favor of defendant would not be disturbed.

In *McDonald v. Franchere*, 102 Iowa, 496, 71 N. W. 427, the plaintiff, while in a department store belonging to defendant, was asked by a clerk, who suspected her of stealing a pepper-caster from a counter, to go to another room, which plaintiff did. When in the other room the clerk accused her of the theft, or asked if she took it, there being a conflict of evidence on this point. The court held that the clerk acted within the scope of his duties so as to make his masters liable for the assault.

In *Knowles v. Bullene*, 71 Mo. App. 352, it was held that where plaintiff was arrested by the floor-walker of a department store on the report of a salesgirl that she saw plaintiff steal a piece of lace, that the arrest would be held to have been made by the girl, and thus come within a direction of the proprietor not to make arrests for shoplifting unless the sales people actually see the theft.

But, if the malicious act of the servant is outside of the scope of the employment, and not in furtherance of the master's business, the master is not held liable in exemplary damages. Thus in the very recent case of *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276, the plaintiff was accused by the floor-walker of defendant, who conducted a large department store, of having stolen a bolt of lace. The accusation was made as she was leaving the store with her daughter, the floor-walker, at the time, stepping back of plaintiff and apparently taking a bolt of lace from under her arm, saying, "Here it is." Plaintiff denied having taken the lace, but was requested to return into the store, and was conducted into a small room, which was then locked, and she was then searched for stolen goods, the floor-walker tearing her dress open in front in making the search. While making the search he told her that he would send her to the police station unless she paid him fifty dollars. Though she denied having stolen any goods, she gave him all

the money which she had, amounting to fifteen dollars, and he let her out. The court, after stating the evidence as to the duties of the floor-walker, said: "Thus it appears that it was Saxe's [the floor-walker] duty to watch customers and prevent them from doing wrongful acts; also to take stolen merchandise away from customers whom he discovered in the act of stealing. Now, if, as a matter of fact, Saxe honestly believed that plaintiff had stolen a bolt of lace or other property in the store, and, acting on that belief, imprisoned the plaintiff and searched her, it seems clear that as to these acts, at least, the defendant would be liable, within the rule of *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304, because the servant was attempting to carry out his duty of taking merchandise from a customer whom he supposed was in the act of stealing it, though using means not authorized by the master. On the other hand, if the servant knew no merchandise had been stolen, but falsely, or by a trick, made it appear that the plaintiff had the lace under her arm and imprisoned and assaulted her in order to extort money from her, the defendant would not be liable for any of his acts, because Saxe had stepped aside from his employment to commit a tort for his own purposes and ends."

The right to recover exemplary damages against the proprietor of the store for an unlawful search of an innocent person by his employés, on a suspicion of having stolen shop goods has been denied unless the act was authorized or ratified by the proprietor, although compensatory damages were allowed. Thus in *Staples v. Schmid*, 18 R. I. 230, 26 Atl. 198, the court said: "It is quite true that the master would have no right to arrest and search an innocent person; but it is equally true that he would have had the right to detain a thief and to recapture his property from him. The case, therefore, was one where the act, aside from any excessive force, might be lawful or unlawful according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact, and where his duty to his master depended upon his decision. The decision was his, as the substitute of the master, and the act was intended by him to be for his master's benefit, and which his duty required if the facts were as supposed. Hence, as to third persons, it was the master's act. The criterion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed." The court, in discussing the excessiveness of the amount of damages in the case, said: "The damages, however, which were awarded are grossly excessive as compensation for the wrong which the plaintiff suffered. They must have been estimated on the supposition that exemplary or punitive damages were allowable in a case of this kind. The law upon this point was settled at an early day by this court in the case of *Hagan v. Providence etc. R. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377, where the late Chief Justice Brayton

clearly shows that unless the principal participates in or approves the wrong of his servant he can be held only for the actual damages occasioned thereby. The opinion by Judge Brayton is quoted with approval by the supreme court of the United States in the recent case of *Lake Shore etc. R. R. Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. Rep. 261, 37 L. ed. 97. For this reason we think a new trial should be granted unless the plaintiff will consent to remit the damages in excess of the sum of one hundred dollars."

d. **Illegal Sale of Intoxicating Liquor to Drunkard Husband.**—The recovery of exemplary damages by the wife for the sale of liquor to a drunkard husband is a matter which is regulated by statute, and of course the decisions from one state are not of prevailing weight in another state unless based upon a somewhat similar statute. In *Franklin v. Schermerhorn*, 8 Hun (N. Y.), 115, it was held that in suits under the statute allowing a wife to recover for the damage to her support through the sale of liquor to her husband when already intoxicated, or where he is known to be an habitual drunkard, that exemplary damages are recoverable where there are circumstances of abuse or aggravation on the part of the vendor.

In *Smith v. Reynolds*, 8 Hun, 128, which was a suit by the wife for the death of her husband while in a state of intoxication caused by sales of liquor by defendant's bartender, though it does not appear from the case whether exemplary damages were sought, the question of the liability of the proprietor for the act of his bartender in selling the liquor during his absence was raised. The court in holding the proprietor liable did not make itself clear as to whether the liability was based on the theory of the relation of principal and agent or the relation of master and servant. The court said: "No principle is better settled in the law relating to the rights and liabilities of principal and agent, than that the principal is liable to third persons for the misfeasance, negligence and omissions of the agent in the business of his agency: *Story on Agency*, sec. 308; *Paley's Agency*, 294. In the note at the foot of the page cited, it is said: 'The general rule is that the principal is responsible, civilly, for the acts of his agent, but not criminally, unless done under his express authority.'

"In note 1, at the foot of page 295, it is said that 'the rule that the master is liable for the wrongful acts of his servants is not confined to domestic servants, but has a more extended operation. All such as act for, do the work of, serve another, are, in contemplation of law, his servants, and fall under the rule. . . . It makes no difference whether these servants are paid by the job or by the year or by the day. A third person has no concern with the terms of the private agreements. The loss to him is the same, let the agreement be either way; nor does it make any difference whether the person for whom the work is done be present or absent. If he ex-

pects to be absent, more care should be used in making the selection. Nor is any distinction taken when the work is of such a nature that the owner cannot be expected to do it himself and must necessarily employ others to do it. In all these cases the person for whom the work is done is liable, if a third person is injured.

"In note 1 to page 302 it is said: 'As a general rule, a master is liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in the master's service, . . . and it makes no difference that the master did not authorize or even know of the servant's act or neglect, for even if he disapproved of or forbade it, he is equally liable if the act be done in the course of the servant's employment.' In view of these authorities and others which might be cited the request to charge was properly refused." The charge referred to by the court was to the effect that if the liquor was delivered by defendant's bartender and without defendant's knowledge and after defendant had directed him not to sell or give away any liquor to the deceased, the plaintiff could not recover.

In *Brantigam v. While*, 73 Ill. 561, which was a suit by the wife under a similar Illinois statute, the sale was also made by the defendant's bartender. The defendant sought an instruction to the effect that exemplary damages should not be allowed if defendant had instructed his employes not to sell liquor to plaintiff's husband, and they through mistake or caprice did so. The court modified the request by making it a question for the jury. The court, in laying down the rule in cases under such a statute, said: "The court held in *Freese v. Tripp*, 70 Ill. 496, and in *Keedy v. Howe*, 72 Ill. 133, that where, in good faith, the employes of the saloon-keeper were instructed not to sell to the person who is the subject of the action, being intoxicated or in the habit of getting intoxicated, and the servant willfully disobeys the instructions, the principal is not liable in exemplary damages. The instruction, therefore, as modified, did not go far enough, but left it discretionary with the jury to find or not exemplary damages. This was error.

"It is apparent from the verdict, it going to the farthest extent of the law, that the jury did not confine themselves to the actual damages, but, influenced by the instruction that they could allow for mental anguish and suffering, have gone the whole length.

"This court held in the cases cited, and in *Kellerman v. Arnold*, 71 Ill. 652, and *Meidel v. Anthis*, 71 Ill. 241, and in *Fentz v. Meadows*, 72 Ill. 540, that, under this statute exemplary damages could not be allowed unless it should appear the party charged had sold after warning and notice not to sell. That would present a fair case for exemplary damages. The statute nowhere countenances the idea that exemplary damages may be awarded at the mere caprice of the jury.

"This record may be searched in vain for proof that appellee was injured in her person, in her property or in her means of support by the act of appellant. We would infer, from her testimony, that although her husband was a miller by occupation, he worked but seldom and contributed very little to her support; that she, in fact, had always supported him by her art and skill as a hairdresser. Her husband was an encumbrance, it would seem, and not a useful member of her household. There is no proof whatever that appellee has been injured in either of the respects specified in the statute, and yet she has received damages to the extent of the law. This finding is contrary to the clear intent and meaning of the law as this court has expounded it in the cases supra."

In *Steele v. Thompson*, 42 Mich. 595, 4 N. W. 536, which arose under the Michigan statute for the death of the husband caused by an illegal sale of liquors to him, the court, on the question of the recovery of exemplary damages, said: "First, as to the allowance of more than actual damages. There is much room for contending that the declaration itself restricts recovery to mere compensation for the loss of means of support incurred by Mrs. Thompson, but it is unnecessary to decide whether that it is so or not. The tenor of the evidence is sufficient for the purpose of the point made. According to the case, her husband was an habitual drunkard and on the afternoon in question carried a bottle in his pocket. During the evening he was sitting in Steele's saloon, Steele himself being absent and a bartender being in attendance. A customer came in and after some time invited Thompson and another person to drink, and the bartender waited upon them and all three then went out. This was about 10 o'clock in the evening. Thompson immediately drank at two other places. He carried a lantern and was last seen during that evening going toward the mill pond. The whole particulars do not require statement. There was no evidence of any request or suggestion to Steele to refuse liquor to Thompson, and the case is silent as to whether Steele was aware that Thompson had any wife or family. We think the case is governed by *Kreiter v. Nichols*, 23 Mich. 496, *Gaussly v. Perkins*, 30 Mich. 494, and *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. 801; and that no ground was laid for exemplary damages. There was no showing which could be possibly carried further than to authorize a finding of a constructive liability, if any at all."

IV. Torts Constituting Injuries to Person or Reputation.

a. Libelous Publications.

1. **General Rule as to Publisher's Liability.**—In the principal case (*Crane v. Bennett*) the general principles governing libel actions in general and particularly such cases in which the libelous publication was perpetrated by the employes of the newspaper proprietor during

his absence, were so thoroughly discussed that it would seem unnecessary to restate them.

The principal case, as we have seen, states the rule in New York to be that evidence establishing the falsity of the alleged libelous publication is evidence of malice, and that where such evidence is presented it is a question for the jury whether the malice is of such a character as to call for punitive damages regardless of whether there be any evidence tending to show a want of actual malice. And it also appears to be established that where a newspaper proprietor surrenders to his manager or employé the general management of his business affairs and absents himself from the jurisdiction where his paper is published, leaving such manager in entire control and charge thereof, the proprietor is responsible for the manner in which his business is conducted in the same manner as he would be if he had personally conducted his affairs.

This view was also set forth in *Bruce v. Reed*, 104 Pa. St. 415, 49 Am. Rep. 586. In that case a reporter sought to interview plaintiff, who was an attorney and a member of the city council, upon a matter of law, and he refused on the ground that he never gave opinions on legal questions without being retained to do so. The reporter reported the matter to the editor, who wrote an article intimating that the plaintiff when expressing professional views on matters before the city council was being paid by some one. The proprietor of the newspaper knew nothing of the matter. The court, in discussing defendant's liability for exemplary damages, said: "It is true it has been held that express malice in an employé who had written a libel cannot be invoked to swell the damages against the employer, if he was ignorant of the publication and not negligent: *Detroit Post Co. v. McArthur*, 16 Mich. 447; *Scripps v. Reilly*, 38 Mich. 10; *Robertson v. Wyde*, 2 Moody & B. 101. It was, however, held in *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 2 Am. Rep. 39, that whenever exemplary damages would be recoverable, if the act had been done by the master himself, they are equally recoverable when the act is done by his servant. So in *Wood on Master and Servant*, section 323, it is said: 'In many instances it has been held not only that the master is liable for the wanton and malicious acts of his servant in the execution of the authority given him by the master, but also, that in all such cases the wantonness and malice may be shown to enhance the damages,' citing *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383. This conclusion flows logically from the ground on which the liability of the master rests. If he so authorizes the act that he commits it through the agency of another, he cannot claim exemption from any of the legal consequences flowing from the act. If this view of the law is applicable to any employer, we are unable to see why it shall not apply to the proprietor of a newspaper, who employs others to write for its columns. The proprietors do not always reside in the city in which the paper is published. They may be in foreign coun-

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tries much of the time. They direct the general course to be pursued; but do not restrict the writers as to the specific means by which the desired end shall be attained. If the proprietors are asked to give the name of the author of any article, they refuse to do so, and a person aggrieved, as a general rule, has no means of ascertaining the name of the writer. If they are not held responsible for what they cause to be written and published, every person connected therewith may escape those punitive damages which the law frequently imposes."

In *Morgan v. Bennett*, 44 App. Div. 325, 60 N. Y. Supp. 619, which was one of several previous cases against the defendant in the principal case, the court said: "This court held in *McMahon v. Bennett*, 31 App. Div. 16, 52 N. Y. Supp. 390, that the fact that the defendant was absent and did not know of the publication, or that he had made rules for the governance of his employes, unless the rules were enforced, was entirely irrelevant. We then said: 'Upon the trial it appeared in evidence that at the time of the publication the defendant was in Europe, and that he had no personal knowledge of the publication; that he had prepared and posted in the office of the newspaper a rule which provided in substance that no article reflecting upon any person or corporation should be published until it had been investigated and found to be true. But this did not relieve him, as contended by his counsel, from punitive damages, provided the jury found that the article referred to was carelessly and recklessly prepared and published. The proprietor of a newspaper is responsible for whatever appears in the columns of his paper,' and it is of no importance, so far as an action to recover damages is concerned, that the same was published without his knowledge. He must see to it, if he desires to escape liability, that articles are not published which unjustifiably injure the reputation or business of innocent people.

"We fully indorse what was said, and it so completely disposes of the question presented as to the third and fourth partial defenses that it is unnecessary to add anything further. It should be noted that there is no allegation that the rules referred to were enforced or that any steps were taken prior to the publication to ascertain whether the facts stated in the article were true or not. A person cannot shield himself from damages for a libelous publication in a newspaper owned or conducted by him by absenting himself when the publication is made or by establishing rules, no matter what they are for the governance of his employes unless such rules be enforced. It is not difficult to see, if such a rule of law prevailed, that a proprietor of a great newspaper could with impunity injure the reputation or destroy the business of any person in the community."

It was also held in *O'Brien v. Bennett*, 59 App. Div. 623, 69 N. Y. Supp. 298, that such rules for the investigation of libelous articles were no excuse for an award of punitive damages where the em-

ployés, as a matter of fact, published the article without making proper inquiry to ascertain its truth or falsity: See, also, *Andres v. Wells*, 7 Johns. (N. Y.) 261, 5 Am. Dec. 267; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, 41 N. E. 409.

So, also, in *Bennett v. Salisbury*, 78 Fed. 769, another case against the same defendant in the cases just noted, these same rules were set up in defense to a suit for the publication of a false and scandalous story charging plaintiff with certain unchaste conduct. The untruthfulness of the charges were admitted. The court, in discussing the merits of this defense, said: "Experience has shown it to be a fact that the rule of implicitly trusting a newspaper correspondent is a dangerous one and that of all slanders those in regard to chastity require prudent investigation, lest the character of innocent persons should suffer a lifelong injury. The rule in question turned over a suspicious story from an unknown author to the regular correspondent. The rule is silent in regard to the character of the investigation; the character of the man who is to make it, the caution, the prudence, the thoroughness with which it must be conducted, the amount of proof which must be required, or the extent of the report which must be made. The story which was received at the office of the 'Herald,' if it was true, wrecked, and if it was not true, must injure the happiness of two families, and was of such a character as to require especial caution before publication. The jury probably found that the rule was inadequate to meet the imperative demands for prudence and caution which an investigation of the truth of such a narrative required. If such a rule is to protect from punitive damages the absent or nonresident owners of newspapers who intrust the management of their large properties and businesses to subordinate agents, the principle of law which makes careless indifference to an injury which may happen to others equivalent to malice can be easily avoided. It is probably true that the requirement of a more stringent rule and more searching habits and practice of investigation and of more self-denial in respect to publication of libelous matter would compel a marked diminution of that style of news, but such a result would not be a cause for anxiety."

In *Eviston v. Cramer*, 57 Wis. 579, 15 N. W. 760, the reporter was considered in the light of an agent. The court, in holding that the newspaper proprietor was not liable in exemplary damages for his malice, said: "And it must be deemed the settled law of this state that the principal is not responsible in exemplary damages for the actual malice of the agent unless he has participated in or ratified and confirmed the malicious act of the agent. Of course, if the principal authorizes or directs the wrongful act then his own bad intent will be imputable to it. It is said the answer shows that Bleyer (the reporter) was directed by the defendants to inquire into the matter of the charges and investigation of the plaintiff's conduct, write out the result of his examination, and publish it; therefore

they ought to be held responsible to the full extent he would be. We cannot adopt that view. We cannot presume from what is stated in the answer that the defendants authorized or expected their reporter would write and publish a false and malicious libel upon the plaintiff. The reporter's employment ought not to be held as authorizing him to do any such thing."

In *Mallory v. Bennett*, 15 Fed. 374, the proprietor was absent at the time of publishing the libel. The court said: "The action of libel, so far as it involves questions of exemplary damages and the law of principal and agent, is controlled by the same rules as are other actions of tort." And continuing it said, with reference to the right to recover exemplary damages: "It is recognized and enforced against employers when there has been gross misconduct on the part of their employés."

In *Buckley v. Knapp*, 48 Mo. 152, it was held that a newspaper proprietor is liable for whatever appears in its columns, regardless of whether he knew of the publication or authorized it. So in *Dunn v. Hall*, 1 Ind. 355, the proprietor of a paper was held responsible for a libel allowed to be inserted by his foreman in his absence, although he had expressly forbade him from allowing any communication to be published from the author of the libel unless all personal references were cut out. And in *Youmans v. Paine*, 86 Hun, 479, 35 N. Y. Supp. 50, the publication was made by the defendant's foreman without their knowledge. The court said: "The presumption of law is that the publication, if false and libelous, was malicious: *Warner v. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. 393. That presumption was sought to be rebutted by the defendants upon trial of the cause by showing that they had no personal knowledge of the publication; and, in fact, that whatever was done was done by their agent. It must be assumed under the answer and from the fact of justification therein that they became liable for the act of their agent and stood upon that justification as a defense. The agent was acting in the course of his employment: *Fogg v. Boston etc. R. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583, and note."

But in *Smith v. Ashley*, 11 Met. (Mass.) 367, 45 Am. Dec. 216, it was held that where the publisher believed an article published by him to be a fictitious narrative, but it proves to be libelous, he is not liable.

2. **Unchaste, Reckless or Grossly Careless Libels.**—From the discussion of the cases in the previous section we have seen that the courts have held the publisher liable for the reckless editorial or reportorial work of his employés during his personal absence, even though he has posted rules for their guidance in performing their respective duties. The courts, as we will see by the following cases, lay particular stress upon the publication of unchaste stories or grossly careless and reckless charges against a person's reputation, and hold that the excuse that the hurry of large metropolitan journals

in going to print is no justification for the publication of libels of the character mentioned. That view was dwelt upon quite elaborately in the case of *Bennett v. Salisbury*, 78 Fed. 769, from which we quoted very liberally in the forepart of our discussion of the subject. So, also, in *Smith v. Matthews*, 152 N. Y. 158, 46 N. E. 164, which was a suit for the publication of a libel attacking without the shadow of justification the good name of an innocent wife and mother, charging her with an elopement, the court said: "The learned counsel for the defendants insist that punitive damages are only recoverable in case of actual malice when the wicked intent to injure exists. The rule is otherwise, and it has been repeatedly held in this state that a libel, recklessly or carelessly published, as well as one induced by personal ill-will, will support an award of punitive damages": Citing *Warner v. Press Pub. Co.*, 132 N. Y. 181, 185, 30 N. E. 398; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Holmes v. Jones*, 147 N. Y. 59, 67, 49 Am. St. Rep. 646, 41 N. E. 409; and continuing, the court, in answer to the argument that the publishers were not actuated by any wicked intent to injure the plaintiff because they had received the item through the United Press Association, held that they must abide the consequences where it was their custom, on receiving items of news, to publish it without ascertaining their truth or falsity before publication.

In *Scripps v. Reilly*, 38 Mich. 27, the court, after adverting to the manner of collecting news for metropolitan daily newspapers, said: "If a person were about to publish an article he knew would be libelous, undue haste on his part to throw it before the public might well be considered as an aggravation of the offense, while, if he were acting in good faith, with pure motives and with an earnest desire to give the public what he considered an important item of news, haste in so doing would be praiseworthy; and should such an article afterward appear to be untrue and libelous, his motive in publishing it and the time he had for investigation or deliberation might well be considered in mitigation of such damages as gross negligence might be shown to increase." And continuing the court said: "The law endeavors to protect private character from detraction and abuse, and when private character is dragged before the public for such a purpose, not as a subject in the discussion of which the public may reasonably be supposed to have an interest, but to pander to a depraved appetite for scandal, such publications soon give character to the paper. The publication of such articles, whether the facts stated therein are true or not, are improper and unjustifiable and show recklessness and a want of due care on the part of the publishers of the paper.

"Such articles are usually published from impure and sordid motives, and when permitted or countenanced by those in authority, the employes are thereby encouraged and sanctioned in continuing such a reprehensible course. An employé engaged by the publishers

of a reputable journal would with diffidence publish scandalous matter therein, and if reprimanded for so doing would not be likely to repeat the offense, while one employed in seeking for and publishing news in one of less character, when once sanctioned by his employer in the publication of such matter, would thereafter be much more likely to seek for and publish all such with avidity. Under such dissimilar circumstances it would be folly to expect in such case thereafter the same care and prudence in the selection of articles for publication. When, therefore, in a case like the present, it becomes important to consider what degree of care and prudence has been exercised by the proprietor of a newspaper in the publication thereof, we can see no good reason why the character which the paper has earned may not be shown, irrespective of the truth or falsity of the articles, by the introduction of the paper containing them to aid the jury in determining the question.

“And while even where the very best of care is exercised, libelous matter may sometimes creep into newspapers of character, and for which the publishers will be liable to respond in damages, yet they will be protected from such damages as a jury would be sure to inflict upon those who are reckless and indifferent as to the rights and feelings of others, who hesitate not to publish scandalous matter, the publication of which can accomplish no good or useful public purpose. There doubtless may be a publication of many things harmless in themselves which in no way interest the public and of which no one would complain. We have not intended to say anything against the publication of such articles.”

3. Distinction as to Malice Where Publisher is a Natural Person and Where a Corporation.—The rule as to the imputation of actual malice to the newspaper proprietor is slightly different when the proprietor is a natural person than when a corporation is the proprietor. Thus in *Lothrop v. Adams*, 133 Mass. 480, 43 Am. Rep. 528, the libelous matter was written up after an investigation by an assistant local editor or reporter. The court treated the relation of the newspaper proprietor and the reporter as that of principal and agent. It said: “The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.”

4. Ratification by Proprietor.—In the early case of *Edsall v. Brooks*, 2 Rob. (N. Y.) 417, it was held that actual malice was not proved against the proprietors of a newspaper, who had not directed and knew nothing of the libel complained of, by showing that their

city editor refused to publish a full detraction. In *Goodrich v. Stone*, 11 Met. 492, in discussing whether the proprietor of a newspaper ratified a libelous article claimed to have been inserted clandestinely, the court said: "If he could avail himself of a defense founded on the fact that the publication was made contrary to his intent and against his orders or through some fraudulent act of another, he should avail himself of the earliest practicable opportunity to disavow the publication and to disown it and repudiate it in plain and direct terms, such as will, as far as possible, correct the error and repair the wrong unintentionally inflicted through the columns of a newspaper of which he is the proprietor. If, on the contrary, he subsequently publishes an article in reference to such previous article, giving it his sanction, or omitting to repudiate it or retract the charge contained in it, such subsequent article may properly be introduced as indicative of the true position of the proprietor of the paper, as to the previous article."

And in *Haines v. Schultz*, 50 N. J. L. 481, 14 Atl. 488, the libelous article was also inserted in the newspaper without the knowledge of the proprietor. It was sought to charge the proprietor with exemplary damages therefor, but the court in refusing to allow such damages, said: "And had there been any proof of such approval, any testimony of general instructions, of which this libel was the outgrowth, any evidence as to ratification, the jury might have been warranted in inferring a wrongful motive to fit the wrongful act. But absence of proof of his disapproval, absence of proof that defendant had reproached his employé, or that he had discharged him—in fine, absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence without leading to a most dangerous extension of the doctrine, respondeat superior."

"A plaintiff whose claim to punitive damages rests upon a wrongful motive of defendant, not inherent in the offense which fixes his liability, must present some proof from which such wrongful motive may be legally inferred."

And later in the same case the court also said: "Proprietors of newspapers are unquestionably liable in law for whatever appears in their columns. Libelous publication is a wrongful act, and when to a wrongful act we add testimony from which a wrongful motive can be inferred, punitive damages may be inflicted. But the maxim 'Respondeat superior' is a rule of limitation as well as of liability. If a principal must, on the one hand, answer for his agent's wrongdoing, on the other hand, his liability is circumscribed by the scope of his agent's employment unless there be proof of a ratification by him of his agent's misconduct. No rule of law is better established than this. The same principle applies, and with equal force, to the doctrine of exemplary damages."

In *Mallory v. Bennett*, 15 Fed. 375, it was declared that: "When a newspaper, after publishing an atrocious calumny, refuses to retract it upon discovering its true character, and refuses to disclose the name of the originator, fair-minded men are disposed to think that the conductors of the paper are willing deliberately and completely to assume the paternity of the slander, and identify themselves with the author. If the ethics or canons of journalism do not permit the names of anonymous correspondents to be disclosed or retractions to be made, such a code will hardly be respected in the jury-box or find advocates upon the bench."

b. Personal Injuries.

1. From Assaults and Batteries.

A. In General.—In suits for damages for assaults and batteries, personal injuries are generally shown to have resulted; hence it cannot always be ascertained whether exemplary damages were claimed or whether the jury in the particular case awarded more than mere compensatory damages. It does not, however, seem to be questioned but that the master may be liable in punitive damages for an assault committed by his servant, where the assault is committed under such circumstances as will warrant the assessment of such damages: *Ara-smith v. Temple*, 11 Ill. App. 39. The test for ascertaining when exemplary damages are properly awarded in cases of assaults was set forth in *Boyer v. Coxen*, 92 Md. 370, 48 Atl. 161. In that case, which was a case involving the recovery of punitive damages for an assault, the court said: "We said in *Smith v. Philadelphia etc. R. Co.*, 87 Md. 51, 38 Atl. 1072, that 'the force with which the act complained of was done is not the test by which the inquiry as to whether punitive damages are recoverable is to be determined'; and we had so stated in effect in the case of *Philadelphia etc. R. Co. v. Hoefflich*, 62 Md. 307, 50 Am. Rep. 223; but in those cases we also quoted with approval from *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. (U. S.) 213, 26 L. ed. 73, that, 'Whenever the injury complained of has been inflicted maliciously or wantonly and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations.' If the servants of the defendants, acting on the belief that it was their duty to remove Coxen or his team in order to clear the way for other customers, had used more force in doing so than was necessary, it would not necessarily have made them liable for punitive damages, but when one of them used an instrument, such as has been described [a monkey-wrench], in the manner and with the results spoken of by the plaintiff and his witnesses, such conduct was evidence of an evil motive in the act done

which the jury was properly permitted to consider in passing on the question of damages. 'The tort is aggravated by the evil motive and on this rests the rule of exemplary damages': *Railroad Co. v. Arms*, 91 U. S. 493. In one of the latest cases on the subject in this court, we held that if the jury found that the plaintiff 'was treated with reckless violence and indignity' that they could award punitive damages: *Thillman v. Neal*, 88 Md. 525, 42 Atl. 242. Even if a defendant has a right to do in a proper manner the act complained of, if it be done 'wantonly and in a high-handed and outrageous manner,' he is liable to exemplary damages: *Philadelphia etc. R. Co. v. Larkin*, 47 Md. 164, 28 Am. Rep. 442. Can it be doubted that it was 'wanton, high-handed and outrageous' in *McKewen* to beat the plaintiff over the head with a monkey-wrench eighteen inches long, break his nose and otherwise seriously injure him, simply because he refused to move his team until the commission merchant was communicated with, even conceding that he had no right to make such a demand? Yet, that is what the plaintiff's testimony showed, and when the prayer authorized the jury, in its discretion, to award exemplary damages, if it found the act of *McKewen* to be 'wanton and attended with reckless violence,' it was clearly free from the objection that there was no legally sufficient evidence to justify its submission. The judgment must be affirmed."

In *Ward v. Young*, 42 Ark. 542, the lessee of a penitentiary, who as such had charge of all the convicts, was held liable in exemplary damages for an assault committed by a trusted convict, whom he had placed in charge of his premises to protect them from trespassers, on a boy who was lawfully upon the premises to shoot birds. The question whether the relation of master and servant existed was raised, but the court held the relation did exist.

In *Wade v. Thayer*, 40 Cal. 578, the plaintiff, who had gone, while intoxicated, in a hotel bedroom without having obtained permission, sued for an assault committed on him by the porter and hotel clerk and participated in by the proprietor himself. In reviewing the charge of the trial court the appellate court said: "They embody but two general propositions; i. e., first, that the defendants were not liable for punitive or exemplary damages, however malicious and provoked the assault may have been, but only for the actual damages which the plaintiff suffered; second, that if either one of the defendants were not present at, and did not advise or aid in, the assault committed by the others, he is not responsible in damages. The first proposition is not sound law. It is too well established to need the citation of authorities that exemplary damages may be given for a wanton, malicious and unprovoked assault upon the person, and it is equally plain that if the assault was committed by *Land* and *Carmody* whilst in the performance of their duties as the servants and employes of *Thayer*, the latter would be responsible for the actual damages which the plaintiff suffered, even though he was not

servant; but according to the defendant's evidence it was the act of the servant in self-defense and contrary to the defendant's express command. The defendant requested the court to rule 'that he was not responsible for the act of the servant, if done contrary to his express command.' But we think this ruling was rightly refused. Instead of it, the court gave correct instructions. After stating correctly the legal rights, the court ruled 'that, if the defendant was wrongly maintaining his entry by force, and employing his servant so to do, he was liable for the act of his servant in maintaining such entry, although the servant used more force than he was authorized by the master to do; and that the plaintiff, if in the right, could only use reasonable force in expelling the defendant, who was not liable for repelling unreasonable force.' These instructions were all that the case required. Much depended on the question of title, and if the defendant was using force wrongfully, and employing his servant to assist him in doing a tortious act, his general purpose, the fact of his presence, his silence while the acts of violence were done, and his whole deportment during the assault and battery by his servant, would be as significant as his previous direction to the servant not to touch the plaintiff. The facts as reported would authorize the jury to find the defendant guilty, notwithstanding that direction." It does not clearly appear in this case whether the plaintiff sought to recover exemplary or merely compensatory damages, though the gist of the action seems to have been the assault by the servant.

The actions involving assaults by employees while retaking property sold conditionally are illustrated by the following cases: In *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169, the defendant, who was the proprietor of a large department store, was sued for a false imprisonment caused by the driver of one of his delivery wagons, who insisted on payment or return of an article delivered to the plaintiff, which plaintiff had paid for, but the payment of which was not shown by the driver's book. The driver was employed under a contract by which he was charged with the value of any merchandise which might be lost, damaged or stolen after being placed in his charge. The court said: "We have here presented the question as to proper measure of damage in the case of a merchant, whose servant, in the delivery of goods, caused the illegal arrest of a customer. The fact that the master was not present when the arrest was made does not necessarily absolve him from liability. If, on the evidence, the jury could find that the master authorized the arrest, or subsequently ratified it, he must respond in damages. In the case before us it is not claimed the master directly authorized the arrest of the plaintiff or ratified it when brought to his attention. It was, however, a question for the jury to determine, if the evidence warranted it, whether the manner in which the defendant con-

ducted his business, through the intervention of the driver, constituted such a system as to render the act of the driver the act of the master." And continuing the court said: "The driver's remark, 'I have got to have the stove or the money, because I am responsible for it,' should be considered by the jury in determining whether the driver acted for the defendant or himself. If the jury are to pass upon the question whether a system existed in defendant's business authorizing this arrest, they must also consider the circumstances under which the driver was employed."

In *O'Connell v. Samuel*, 81 Hun, 357, 30 N. Y. Supp. 889, the court sustained a judgment against the master and his servant for an assault committed by the servant while attempting to obtain payment or the possession of a baby carriage leased to the plaintiff at a weekly rental, the title to pass to plaintiff on payment of a certain sum but with the right on default in payment to retake the property. The plaintiff made default in her payments but refused to allow the collector to retake the property, and resisted his attempt to enter her house, but he overcame the resistance, tearing her dress and inflicting bodily injury on her. The court held that the collector in attempting to retake the property was acting in the business of his employers, even though his actions in accomplishing his purpose may have been or became willful on his part, and were contrary to his instructions not to use forcible means to enter houses or do acts of personal violence to get possession of property under circumstances like the one at bar.

In *McClung v. Dearborne*, 134 Pa. St. 396, 19 Am. St. Rep. 708, 19 Atl. 698, 8 L. R. A. 204, the plaintiff and his wife had purchased an organ from another person; the person from whom they purchased the organ had had the organ only on trial, with an agreement with the owner [the defendant] that if she was pleased with it that she would execute a contract for its purchase on the installment plan. The defendant, who was in the organ-selling business, had a servant whose duty it was to hunt and recover organs on which one or more installments were unpaid, whether in hands of the original purchasers or their vendees. He obtained admission to the house of the plaintiff by means of a falsehood and secured the number and description of the organ. He represented to his employer that he could recover the organ without a breach of the peace. His employer furnished him a team and two negroes so as to recover the organ, but directed him to be careful about the matter and not have any row about it. He secured admittance to plaintiff's house again by false pretenses and proceeded to remove the organ. The plaintiff's wife and two sons resisted the removal and he thereupon assaulted them. The plaintiff sued for the assault and recovered. The recovery was sustained. The appellate court, in adverting to the directions of the defendant to the servant who seized the organ, said: "These directions show that Dearborne knew the errand on which

he sent his employes was one that was likely to result in trouble, and would require to be managed with great coolness and care in order to avoid collision and a breach of the peace. But however the rule may be held in regard to the criminal liability of the master under such circumstances, it is very clear that he cannot escape liability civilly by virtue of his instructions to his servant as to the manner of doing an act which the servant is to undertake on his behalf. He knew that the invasion of McClung's house in the manner contemplated was likely to excite indignation and resistance on the part of the inmates, and that what ought to be done might have to be determined under excitement, and without time for consultation or reflection by his employes. Under such circumstances he put them in his own stead, and he is bound by what they do in the effort to do the thing which was committed to them"; citing *Sanford v. Eighth Ave. etc. R. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286; *Lake Shore etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519, 57 Am. Rep. 444, 6 Atl. 545; *Pittsburg etc. Ry. Co. v. Donohue*, 70 Pa. St. 119; *Hays v. Millar*, 77 Pa. St. 238, 18 Am. Rep. 445; *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405. "The defendant was bound not only to give proper instructions to his servants when sending them on such an errand, but he was bound to see that his instructions were obeyed." And continuing the court said: "The acts complained of were committed in the course of, and as a means to, the accomplishment of that for which they were sent. Let it be conceded that they were instructed to do no wrong and that they were warned what not to do, the master is nevertheless liable. When he sends them upon an errand that exposes them to resistance and danger and the excitements consequent upon the presence of such a state of things, he must take the chances of their self-control and ability to obey. If he finds the risk inconveniently expensive, he may condescend to respect the homes of inoffensive citizens and rely on his legal remedies for the recovery of any property to which he may claim title hereafter."

PEOPLE v. LOCHNER.

[177 N. Y. 145, 69 N. E. 573.]

CONSTITUTIONAL LAW.—The Court Inclines to so Construe a Statute as to validate it. (p. 783.)

CONSTITUTIONAL LAW.—Power to Regulate Bakeries.—It is within the police power of the legislature to so regulate the conduct of the business of carrying on bakeries as to best promote and protect the health of the people. (p. 786.)

CONSTITUTIONAL LAW.—The Fact that a Provision of a Statute is Part of the Labor Law does not establish that it is not also a health law, if its provisions are germane to that subject, and if sustainable as a health law, it cannot be declared unconstitutional because made part of a statute purporting to regulate labor. (p. 787.)

CONSTITUTIONAL LAW.—A Statute Limiting the Hours of Labor of Employees in a Bakery to sixty hours in each week and ten hours in one day is constitutional, because it must be assumed that its object is to protect the health of such employes. (pp. 789, 790.)

Prosecution under section 384 of the Penal Code of New York, which provides that anyone who violates, or does not comply with, article 8 of the labor law relating to bakeries and confectioneries is guilty of a misdemeanor, and upon conviction, must be fined for the first offense not less than twenty nor more than one hundred dollars, and for the second offense not less than fifty nor more than two hundred dollars, or be imprisoned for not more than thirty days, or both such fine and imprisonment. The indictment charged the defendant with having been arrested and convicted in December, 1899, of violating the labor law in permitting one of his employes to work in his bakery more than sixty hours in one week, and, having paid the fine imposed on such conviction, that the defendant violated the same law in permitting and requiring another employé to work more than sixty hours during the week commencing April 19, and ending April 26, 1901. A demurrer to the indictment having been interposed, it was overruled, and no further pleading being filed by the defendant, the indictment was taken as confessed against him, and judgment of conviction was entered thereon. This judgment was affirmed by the appellate division by a divided court, and from the latter judgment an appeal was taken to the court of appeals.

William S. Mackie and Smith M. Lindsley, for the appellant.

Timothy Curtin, for the respondent.

147 PARKER, C. J. Defendant's conviction is under subdivision 3, section 3841 of the Penal Code, which makes a violation of article 8, chapter 415 of the Laws of 1897, a misdemeanor. The judgment is affirmed by the appellate division.

Defendant urges as ground for a reversal that article 8—which on its face purports to be, as we shall see later, an exercise of the police power of the state—offends against the ¹⁴⁸ first section of the fourteenth amendment to the United States constitution. That section provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is also claimed that the statute violates those provisions of the state constitution which declare that "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers" (Const., art. 1, sec. 1), "nor be deprived of life, liberty or property without due process of law": Const., art. 1, sec. 6.

The first case in which the fourteenth amendment is discussed by the United States supreme court are the Slaughter-house Cases, 83 U. S. 36, 21 L. ed. 39, wherein is challenged the Louisiana statute authorizing the removal of noxious slaughter-houses from the more densely populated part of New Orleans, and their location where they could least affect the health and comfort of the people, and to that end granting a corporation exclusive right for twenty-five years to maintain slaughter-houses within three parishes, containing between two hundred thousand and three hundred thousand people, and including New Orleans. This is held to be a police regulation for the health and comfort of the people, and, therefore, within the power of the state legislature, and not affected by the fourteenth amendment, which the court says is not intended to interfere with the exercise of police power by the states.

In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 347, 28 L. ed. 923, the supreme court has before it a San Francisco ordinance prohibiting work in public laundries within defined territory from 10 P. M. to 6 A. M., claimed to be repugnant to the fourteenth amendment. The court rules that the ordinance is well within the police power, and in the course of the opinion says: "Neither the amendment—broad and compre-

hensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations ¹⁴⁹ to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity” (page 31, 113 U. S., page 359, 5 Sup. Ct. Rep. and 28 L. ed. 923).

There are many interesting cases in the United States supreme court sustaining statutes of different states which in terms seem repugnant to the fourteenth amendment, but which that court declares to be within the police power of the states. Among them are statutes declaring a railroad company liable for damages to an employé, although caused by another employé (*Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107), fixing the damages at double the value of the stock killed, when due to the neglect of a railroad company to maintain fences (*Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 28, 32 L. ed. 585); requiring locomotive engineers to be licensed, and providing that the railroad company employing them pay the fees of examination (*Nashville etc. R. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. Rep. 28, 32 L. ed. 352); requiring cars to be heated otherwise than by stoves on railroads over fifty miles in length (*New York etc. R. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. Rep. 418, 41 L. ed. 853); providing for immediate payment of wages by railroad companies to discharged employés (*St. Louis etc. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. Rep. 419, 43 L. ed. 746); prohibiting options to sell grain (*Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425, 46 L. ed. 623); providing for inspection of mines at expense of owners (*St. Louis etc. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. Rep. 616, 46 L. ed. 872), and one declaring void all contracts of sales of stocks on margins: *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. ed. 323.

I shall call special attention to but one other case, namely, *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780. In that case the court reviews at length many of the cases arising under the fourteenth amendment, beginning with the Slaughter-house cases. The case involves a Utah statute providing that: “The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency, where life or property is in imminent danger.” Violation is made a misdemeanor. The con-

viction of one Holden under that statute is affirmed by the United States supreme court. It is argued by defendant in that case that the statute has no relation to the health or safety of the public or the persons affected, or if so, only in a very remote degree, while its direct and principal effect is to interfere ¹⁵⁰ with the rights and liberties of the contracting parties; that the right to contract contains three essential and indispensable elements, guaranteed and protected by the United States constitution, namely, "the right of the employer and employé to agree upon (1) the character of the service to be performed, (2) the amount to be paid for such service, and (3) the number of hours per day during which the service is to continue"; that the destruction or abridgment of one element is a destruction or abridgment of the whole of said right to contract; that the statute abridges the "privileges and immunities" in that it deprives the employer and the employé of perfect freedom and liberty to pursue unmolested a lawful vocation in a lawful manner; that the rights of the employer and employé in that direction were unlimited before the adoption of the fourteenth amendment, and that since its adoption it is beyond the power of any state to make any laws abridging or destroying such rights. This latter contention—which if sustained would practically prevent all further development of the police power on the part of the states—is overborne by the court. Many cases passed upon by the court since the adoption of the fourteenth amendment are cited furnishing illustrations tending to justify the boast of the devotees of the common law, that by the application of established legal principles the law has been, and will continue to be developed from time to time so as to meet the ever-changing conditions of our widely diversified and rapidly developing business interests. The court quotes from Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 530, 4 Sup. Ct. Rep. 111, 118, 28 L. ed. 232: "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . . The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems ¹⁵¹ and of every age; and as it was the charac-

teristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we shall expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms." The court illustrates by forceful examples the necessity of recognizing in legal decisions the change of conditions. After calling attention to the fact that in the early history of the country there was no occasion for any special protection of a particular class, as we were almost purely an agricultural country, it instances coal mining and the manufacture of iron. When these industries began in Pennsylvania as early as 1716 they were carried on in such a limited way, and by such primitive methods, that no special laws were deemed necessary to protect operatives; but since that time they have assumed such vast proportions in that and other states, and developed so many dangers to the safety and life of those engaged in them, that laws to meet such exigencies have become necessary. It calls attention to many protective statutes enacted in many different states providing for fire escapes in hotels, theaters, factories and other large buildings; inspection of boilers; appliances to obviate the dangers incident to railroad and steamboat transportation; the protection of dangerous machinery against accidental contact; the shoring up of ventilation shafts; means for signaling in mines for fresh air; the elimination as far as possible of dangerous gases, and safe means of hoisting and lowering employes in mines. It is said that statutes providing such safeguards "have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional" (Holden v. Hardy, 169 U. S. 366, 394, 18 Sup. Ct. Rep. 383, 389, 42 L. ed. 780), which, of course, means that the courts of the several states making these decisions hold that such statutes do not deprive citizens of any of the rights or privileges guaranteed by the constitution, nor deprive them of property without due process of law, for every state constitution contains ¹⁵² such a provision or its equivalent. Of such illustrations the court further says (page 387, 169 U. S., page 386, 18 Sup. Ct. Rep. and 42 L. ed. 780): "They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by

which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land." This broad-minded view—which is characteristic of the development of the law by this great court since the adoption of the fourteenth amendment—should, and doubtless will, be followed by the courts of the several states whenever called upon to determine whether statutes offend against the provisions of state constitutions similar or equivalent to the provisions of the fourteenth amendment. The cases cited, and the reasoning of the court to which but brief reference is here made, demonstrate that this statute does not offend against the fourteenth amendment, and it necessarily follows that it is not repugnant to equivalent provisions in our state constitution.

This court throughout all its history has maintained the same position as that taken by the United States supreme court. Many authorities could be cited in support of that assertion, but none need be, for they are all in one direction.

The impossibility of setting the bounds of the police power has up to this time prevented any court from attempting it, and the reason for it is well stated by Judge Gray in *People v. Ewer*, 141 N. Y. 129, 132, 38 Am. St. Rep. 788, 36 N. E. 4, 25 L. R. A. 794. He says: "It is difficult, if not impossible, to define the police power of a state; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the state in the interest and for the welfare of its citizens. We may say of it that when its ¹⁵³ operation is in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community, no constitutional guaranty is violated, and the legislative authority is not transcended." In that case the constitutionality of section 292 of the Penal Code is questioned. That section makes it a misdemeanor to exhibit as a dancer a female child under fourteen years of age. The court denies that the statute violates our constitution because it deprives the mother, the

person arrested, of the rights and privileges secured to her by the constitution.

In *People v. Warden etc.* 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, the constitutionality of chapter 602 of the Laws of 1892 is challenged. The act provides for examination and registration of master plumbers, and makes it a misdemeanor for any person to engage in that trade without such registration. This court holds the statute to be within the police power of the legislature, and, therefore, not repugnant to the constitution. Judge Gray says in the opinion (page 535, 144 N. Y., page 688, 39 N. E. and 27 L. R. A. 718): "There has been much discussion upon the subject of what is a valid exercise of the police power of the state through legislative enactment, and there is little to be added to what this and other courts have said. The police power extends to the protection of persons and of property within the state. In order to secure that protection, they may be subjected to restraints and burdens by legislative acts. If the act is a valid and reasonable exercise of the police power of the state, then it must be submitted to, as a measure designed for the protection of the public and to secure it against some danger, real or anticipated, from a state of things which modifications in our social or commercial life have brought about. The natural right to life, liberty and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the welfare, health or prosperity of the state. The individual must sacrifice his particular interest or desires if the sacrifice is a necessary one in order that organized society as a whole shall be benefited. That is a fundamental condition of the state, and which, in the ¹⁵⁴ end, accomplishes by reaction a general good, from which the individual must also benefit."

In *Health Department v. Rector etc.*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, the court considers a provision of the New York consolidation act requiring that tenement houses already erected shall be furnished by the owners with water, "whenever they shall be directed so to do by the board of health," "in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families." The health department served a notice requiring defendant to supply water, as commanded by the statute, in buildings owned by it. Defendant refused to do so, and an action was brought by the health department to compel compliance. Defendant contends in that case that the statute violates that

provision of the state constitution which declares that no member of this state shall "be deprived of life, liberty or property without due process of law." This court holds that the statute does not offend against the constitution, but that it is a valid exercise of the police power; that the legislature, by virtue of that power, can direct that improvements or alterations shall be made in existing houses at the owners' expense when it clearly appears that it tends in some plain and appreciable manner to guard and protect the public; and that a compensation need not be made to the owner in such case, the effect of the act being not to appropriate private property, but simply to regulate its use and enjoyment by the owner. Judge Peckham, writing the opinion of the court, says (page 43, 145 N. Y., page 836, 39 N. E. and 45 Am. St. Rep. 579): "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner."

People v. Havnor, 149 N. Y. 195, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689, is a case as near the border line perhaps as any to be found in this state—certainly very much nearer to it than the case under consideration. It exhaustively considers the authorities in this state bearing upon the police power. The case involves the constitutionality ¹⁵⁵ of what is known as the Sunday barber law, which makes it a misdemeanor for any person to carry on the business or work of a barber on the first day of the week except in the city of New York and the village of Saratoga, where such business or work may be carried on until 1 o'clock in the afternoon of that day. The statute is held to be constitutional, because a valid exercise of the police power. The opinion is written by Judge Vann. After a careful examination of the authorities he presents the underlying question in this way (149 N. Y. 201, 52 Am. St. Rep. 707, 43 N. E. 543, 31 L. R. A. 689): "The vital question, therefore, is whether the real purpose of the statute under consideration has a reasonable connection with the public health, welfare or safety." After stating that the object of the act is to require the observance of Sunday, not as a holy day, but as a day of rest and recreation, he proceeds—with argument buttressed by authority in this state and in other jurisdictions—to answer the question in the affirmative. In the course of the argument he says, page 203:

"According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of the citizens, as this causes the least inconvenience through interference with business. It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. . . . The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. . . . As barbers generally work more hours each day than most men, the ¹⁵⁶ legislature may well have concluded that legislation was necessary for the protection of their health."

The pertinency and controlling force of that argument to the question under consideration here will be manifest when we come to an examination of the statute.

No authorities can be found in this court which conflict with the cases to which I have called attention. *Rodgers' Case* (*People v. Coler*), 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814, is cited in opposition, but why I cannot see. The police power is not even considered in that case. The defense to that portion of the statute which is condemned as unconstitutional because it requires a stipulation in all contracts with the state and municipalities that the contractor shall "pay the prevailing rate of wages at least," being rested on the ground (1) that the state as proprietor can do what an individual proprietor can do, namely, insist upon any reasonable provision in a contract as a condition for doing the work: (2) that the state is proprietor not only as to contracts for work for the benefit of the entire state, but also as to contracts for work authorized by it for the various subdivisions of the state made for convenience of administration; (3) that hence it violates no provision of the constitution.

Having shown by an examination of a few of the leading authorities relating to the police power that the decisions of

this court are in harmony with those of the United States supreme court, and having specially brought out some of the argument in those decisions for the purpose of presenting something of the vast scope of that power, we come next to the question, In what spirit should the court approach the consideration of a statute said on the one hand to offend against the constitution, and on the other to be a proper exercise of the police power?

The courts are frequently confronted with the temptation to substitute their judgment for that of the legislature. A given statute, though plainly within the legislative power, seems so repugnant to a sound public policy as to strongly tempt the court to set aside the statute, instead of waiting, as the spirit of our institutions require, until the people can compel their representatives to repeal the obnoxious statute.

¹⁵⁷ In the early history of this country eminent writers gave expression to the fear that the power of the courts to set aside the enactments of the representatives chosen to legislate for the people would in the end prove a weak point in our governmental system, because of the difficulty of keeping the exercise of such great power within its legitimate bounds. So far in our judicial history it must be said that the courts have in the main been conservative in passing upon legislation attacked as unconstitutional, but occasionally, and especially when a case is one on the border line, it is quite possible that the judgment of the court that the legislation is unwise may operate to carry the decision to the wrong side of that border line. Certain it is that the courts have greatly extended their jurisdiction over many administrative acts that were originally supposed not to present cases for the court to pass upon, and in that way the courts have come to play a very important part in state and municipal administration. Some expression of our views on that subject is given in *Matter of Guden*, 171 N. Y. 529, 535, 64 N. E. 451.

Now, when considering the mental attitude with which the court should begin an examination of this question, it is well to have in mind not only the great breadth and scope of the police power, and the legislative control over it as expressed in some of the opinions from which we quote supra, but it is also well to have in mind some of the expressions of this court as to the way in which the court should approach the consideration of such a question as this, involving the constitutionality of a statute.

Judge Andrews says, in *People v. King*, 110 N. Y. 418, 423, 6 Am. St. Rep. 389, 18 N. E. 245, 1 L. R. A. 293: "By means of this power the legislature exercises a supervision over matters affecting the common weal. . . . It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which courts cannot interfere."

Judge Gray says, in *Nechamcus' Case*: "The ¹⁵⁸ courts should always assume that the legislature intended by its enactments to promote those ends [public health, comfort and safety], and if the act admits of two constructions, that should be given to it which sustains it and makes it applicable in furtherance of the public interests": *People v. Warden etc.*, 144 N. Y. 529, 536, 39 N. E. 686, 688, 27 L. R. A. 718.

"Whether the legislation is wise is not for us to consider. The motives actuating and the inducements held out to the legislature are not the subject of inquiry by the courts, which are bound to assume that the law-making body acted with a desire to promote the public good. Its enactments must stand, provided always that they do not contravene the constitution, and the test of constitutionality is always one of power—nothing else. But in applying the test the courts must bear in mind that it is their duty to give the force of law to an act of the legislature whenever it can be fairly so construed and applied as to avoid conflict with the constitution": *Bohmer v. Haffen*, 161 N. Y. 390, 399, 55 N. E. 1047, 1048.

Where there "is room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution, and designed the act . . . to take effect. Our duty, therefore, is to adopt the construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution": *Supervisors v. Brodger*, 112 U. S. 261, 268, 5 Sup. Ct. Rep. 125, 28 L. ed. 704; *People v. Supervisors of Orange Co.*, 17 N. Y. 236, 241; *People v. Albertson*, 55 N. Y. 50, 54; *Gilbert El. Ry. Co. v. Henderson*, 70 N. Y. 361, 367; *New York etc. Bridge Co. v. Smith*, 148 N. Y. 540, 551, 42 N. E. 1088, 1091.

The court is inclined to so construe the statute as to validate it: *People v. Equitable Trust Co.*, 96 N. Y. 387, 394; *People v. Terry*, 108 N. Y. 1, 7, 14 N. E. 815; *Matter of New York*

El. R. R. Co., 70 N. Y. 327, 342; *People v. Angle*, 109 N. Y. 564, 567, 17 N. E. 413; *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 181, 25 N. E. 274, 9 L. R. A. 579; *People v. Rice*, 135 N. Y. 473, 484, 31 N. E. 921, 16 L. R. A. 836.

"Every act of the legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear": *People v. Durston*, 119 N. Y. 569, 577, 16 Am. St. Rep. 859, 24 N. E. 6, 7 L. R. A. 715.

"Before an act of the legislature can be declared void as repugnant to the constitution, the conflict must be manifest": *Matter of Stilwell*, 139 N. Y. 337, 341, 34 N. E. 777.

"If the act and the constitution can be so construed as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such construction": *People v. Rosenberg*, 138 N. Y. 410, 415, 34 N. E. 285.

The statute under consideration in that case is held to be within the police power, as is the statute considered in the following case.

"It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted": *People v. West*, 106 N. Y. 293, 297, 60 Am. Rep. 452, 12 N. E. 610.

Having considered the authorities bearing upon the subject of the exercise of police power at greater length than could be justified were it not for the different view that obtains in this court as to the authority of the legislature to pass the statute in question, and having glanced at a few authorities indicating the frame of mind in which the court should approach the consideration of the question of the constitutionality of an act of the legislature—we come to the consideration of the statute in question, aided by the principles established by the United States supreme court and the courts of this state, to which reference has been made.

I quote the whole statute, notwithstanding its length, in order that it may be at once determined upon its mere reading whether the purpose of the legislature was to subserve, in some measure, the public good under the police power of the state.

100 "ARTICLE VIII.

"BAKERIES AND CONFECTIONERY ESTABLISHMENTS.

"Sec. 110. *Hours of labor in bakeries and confectionery establishments.*—No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in anyone day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work.

"Sec. 111. *Drainage and plumbing of buildings and rooms occupied by bakeries.*—All buildings or rooms occupied as biscuit, bread, pie or cake bakeries shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows, or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

"Sec. 112. *Requirements as to rooms, furniture, utensils and manufactured products.*—Every room used for the manufacture of flour or meal food products shall be at least eight feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed at least once in three months. He may also require the woodwork of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of the room. The manufactured flour or meal food products shall be kept in dry and airy rooms so arranged that the floors, shelves and other facilities ¹⁰¹ for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery or any room in such bakery where flour or meal products are stored.

"Sec. 113. *Wash-rooms and closets; sleeping places.*—Every such bakery shall be provided with a proper wash-room and

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water-closet or water-closets apart from the bake-room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth-closet, privy or ashpit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

"No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

"Sec. 114. *Inspection of bakeries.*—The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the persons owning or conducting such bakeries.

"Sec. 115. *Notice requiring alterations.*—If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly."

That the public generally are interested in having bakers' and confectioners' establishments cleanly and wholesome in this day of appreciation of, and apprehension on account of, microbes, which cause disease and death, is beyond question. Not many years ago the baking was largely done in the ¹⁶² family; but now in a large percentage of the houses in cities and villages the baker is relied on to a large extent to furnish bread, biscuits, cake and pie, as well as confectionery, while over many country roads the bakers' wagons go twice a week or more to supply the farmers and inhabitants of small settlements with their wares. Indeed, it can be safely said that the family of to-day is more dependent upon the baker for the necessities of life than upon any other source of supply. That being so it is within the police power of the legislature to so regulate the conduct of that business as to best promote and protect the health of the people. And to that end the legislature undertakes to provide—by a statute which bears on its face evidence

of an intelligent draftsman acquainted with the dangers of unsanitary conditions in such establishments—for proper drainage and plumbing of the building and rooms occupied for such purpose.

Is there room to doubt that the sole purpose of the legislature in prohibiting the use of cellars for bakeries unless the occupant first complies with the sanitary provisions of this article is to protect the public from the use of the food made dangerous by the germs that thrive in darkness and uncleanness? Is it possible that anyone can question that the sole purpose of the legislature is the safeguarding of the public health when it provides for floors, ceilings and sidewalls of such material as that they may be readily cleansed; compels the keeping of flour or meal food products in dry and airy rooms, so arranged that the storing facilities can be properly cleaned, and prohibits the keeping of domestic animals within such rooms? And will anyone question the motive which induced the prohibition of a "water-closet, earth-closet, privy or ashpit . . . within or connected directly with the bake-room of any bakery, hotel or public restaurant"? If not, why should anyone question the object of the legislature in providing in the same article and as a part of the scheme that "no employé shall be required or permitted to work" in such an establishment "more than sixty hours in any one week," an average of ten hours for each working day. It is ¹⁶³ but reasonable to assume from this statute as a whole that the legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the workrooms, was of the utmost importance, and that a man is more likely to be careful and cleanly when well, and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits, and tends to dirt and disease.

If there is opportunity—and who can doubt it—for this view, then the legislature had the power to enact as it did, and the courts are bound to sustain its action as justified by the police power, as we see from the authorities referred to earlier in this opinion.

I hear but one argument advanced for the purpose of convincing the mind that the object of this statute is not to protect the public, and that argument is that article 8 is to be found in the labor law. Therefore, it is said it is a labor law, not a health law.

The question presented by that argument is, Does the label or the body of the statute prevail? Does calling a statute names deprive it of its intended and real character? If a statute relating principally to banking happens, in the course of codification, to be incorporated as an article in the general corporation law, does it cease to operate on the banking business? I submit without argument that the questions answer themselves.

Assuming, however, for the purpose of argument only, that the label is of such substantial importance that it may be accepted as against the obvious meaning of the statute, then I say that article 8 bears its own title, which is: "Bakeries and Confectionery Establishments." All that is contained in that article relates to bakeries and confectionery establishments and their conduct, and to no other subject whatever. Therefore, it is fully, appropriately and harmoniously entitled.

Again, inasmuch as it is obvious, as we have seen, from a mere reading of the statute, that the legislative purpose is to benefit the public, we must assume—even if the object of the legislature in limiting the hours of work of employes is not to ¹⁶⁴ protect the health of the general public, who takes the wares made by such employes—that the legislature intends to protect the health of the employes in such establishments; that, for some reason sufficient to it, it has reached the conclusion that in work of this character men ought not to be employed more than an average of ten hours a day. Now that being so—and certainly no more restricted view of that statute can be taken by those who would destroy it—we find that the action of the legislature is within the police power not only under the authorities of the United States, but of this state, and of this court.

Special attention has already been called to *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780. A Utah statute making it a misdemeanor to employ a man more than eight hours per day in "underground mines or workings" is sustained, and a conviction thereunder upheld, by the United States supreme court, on the ground that it is within the police power of the state to pass such a statute. That interesting case—to which I have made extended reference, *supra*—is in point and controlling so far as the fourteenth amendment is concerned, and should be controlling in this court so far as equivalent provisions of our state constitution are concerned.

It must, also be held, under the authority of *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689—even though it may be assumed from the reading of the statute that the object of the legislature is to protect employes in such establishments from working more than ten hours a day—that it is within the police power, and, therefore, not repugnant to the state constitution. The statute which that case passes upon makes it a misdemeanor to carry on the business of a barber on the first day of the week, and a judgment of conviction under that law is affirmed in this court because “the statute under consideration has a reasonable connection with the public health, welfare or safety.” Certainly if this court could so hold in that case it must so hold in this, even under the construction of the statute which those would give to it who are affected by the fact that article 8, chapter 32 of the General Laws is grouped with twelve other articles, the compilation being known as the labor law, ¹⁶⁵ instead of being in the domestic law with articles entitled, “flour and meal,” “beef and pork,” or in the “public health law” with articles such as “adulteration,” “practice of medicine,” or the like.

Again, many medical authorities classify workers in bakers’ or confectioners’ establishments with potters, stone cutters, file-grinders and other workers whose occupation necessitates the inhalation of dust particles, and hence predisposes its members to consumption. The published medical opinions and vital statistics bearing upon that subject standing alone fully justify the section under review as one to protect the health of the employes in such establishments, and it is the duty of this court to assume that the section was framed not only in the light of, but also with full appreciation of the force of the medical authority bearing upon the subject—authority which reasonably challenges the attention, and stimulates the helpfulness of the philanthropist.

The conclusion necessarily follows, therefore, from an examination of the statute in the light of the authorities cited, that the purpose of article 8, and every part of it, including the provision in question, is to benefit the public; that it has a just and reasonable relation to the public welfare, and hence is within the police power possessed by the legislature. But if, in violation of the duty of the court as stated in *Supervisors v. Brodger*, 112 U. S. 268, 5 Sup. Ct. Rep. 125, 28 L. ed. 704—which is “to adopt the construction which, without doing vio-

lence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution"—we award to the title of a general law such potency as causes it to overcome both the title and the provisions of an article therein, thus making the provision a labor law, we are still required to hold that it is within the police power.

The judgment should be affirmed.

GRAY, J. I shall concur with the chief judge, whose opinion I regard as carefully expressed and convincing in its reasoning. The question for us is, in the first place, whether, notwithstanding its embodiment in the labor law, we may treat the statutory provision in question, as a health law and in the next place, if we may do so, whether its enactment is a reasonable exercise of the police power of the state, which the courts should give effect to. I am of the opinion that its being placed in the labor law furnishes no adequate reason for limiting its reading and construction by those considerations, which appertain to laws passed, strictly, in the interest of labor, if, from its association with other provisions, in *pari materia*, a different and independent purpose is disclosed. To deprive a health law of its intended operation, because it is not found in the statute book under that, or a kindred, title, would be, in my opinion, to apply an unreasonable and an unsatisfactory test of its validity. If the court concludes that the intent of an enactment in some valid exercise of the police power is to regulate some particular trade or occupation, then, clearly, it should be quite immaterial under what heading it appears to be classified in the statutes. It would not do to nullify the will of the people upon so technical and narrow a consideration. Therefore, I think we may proceed, beyond that ground, to the determination of the question whether, if a health law, the one hundred and tenth section of this article 8 was reasonable and, therefore, a valid exercise of the police power. If it stood alone, unaccompanied and unexplained by cognate provisions, I should incline to the view that the enactment was unconstitutional. It might, justly, be held to fall within that class of legislation which has received judicial condemnation, because, as a regulation of the hours of the employed, its object would appear to be for their protection against the exaction of a disproportionate amount of work for the wages paid. That would be to infringe upon the liberty of contract. But I think we must read the section in connection with those

sections which immediately follow, and then it is that we find it to be made certain that the object of the legislative enactment had relation to the conservation of the public health. We perceive that the legislature is dealing with the workings of a business conducted upon a scale, calling for the employment ¹⁶⁷ of more or less laborers, and which is affected by a public interest, in the sense that the food product may sensibly depend for its healthfulness upon the observance of sanitary rules and precautions. Such precautionary regulations may involve, as well, the establishment of proper conditions to insure the maintenance of the normal vitality of the workman, as the wholesomeness of the general environment. We must presume that the legislative body was animated by a reasonable intention to promote the public welfare and if the courts can give effect to it, because tending to guard the public health, they should, unhesitatingly, do so. Legislation will not be allowed, arbitrarily, to interfere with the personal liberty of the citizen, under the specious guise of an exercise of the police power, and therefore it is, that our courts may supervise, as a judicial question, a determination of the legislature to exercise the police power in restraint of some trade, or calling. It is true that the tendency has been growing in the direction of an excess of paternalism in government and that the courts of this and of other states have, rather, hastened to uphold legislative interference with the pursuits of citizens, upon any plausible pretext of its being in furtherance of the general welfare. The federal supreme court has, in the broadest terms, recognized the power of the individual states to exercise a police power of internal regulation; when the object is to promote by reasonable laws the public safety, health and comfort. To the legislative body is conceded the power to govern men and the affairs of men, through the establishment of such rules and regulations as may be conducive to the public betterment, because tending to the protection of the lives, health and comfort of persons and the protection of property, and that concession has been, in my opinion, at times, more broadly made in the decisions of the courts, than the conservative spirit of our democratic form of government will justify. But that the legislature has, and should have, the broadest authority to exercise a police power of internal regulation, in the direction of protecting the peace, the safety and ¹⁶⁸ the health of the community I fully concede. In this law, which restricts the working hours of employ  s in bakery and confectionery establish-

ments, I think we may, fairly, perceive a statutory regulation, reasonably promotive of the public health, because compelling the master of such an establishment to conduct it in a manner the least capable of affecting his product prejudicially. We may, not unreasonably, assume that an employé may work too long for his health under the conditions, and that an impaired vitality and the possible development of organic diseases may be the result. If, to obviate the possible consequences to the consumer of the food manufactured, the legislature determines to interfere, by limiting, among other regulations, the hours of the workman, I do not think we should hold the interference to be without reason.

VANN, J. I concur in the result reached by the chief judge, for the following reasons: The power of the legislature to pass what it may consider "health laws" is not unlimited, but is bounded by the duty of the courts to determine whether the act has a fair, just and reasonable relation to the general welfare: *Matter of Jacobs*, 98 N. Y. 98, 108, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 401, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Havnor*, 149 N. Y. 195, 200, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689.

As was said by the court in the *Gillson* case: "Under an exercise of the police power the enactment must have some relation to the comfort, the safety, or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest that such is not the object and purpose of the regulation. . . . It is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety and if its measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review."

We have before us simply that part of the labor law ¹⁰⁰ which regulates the hours of labor in bakeries and confectionery establishments by limiting them to not exceeding sixty per week and ten per day, "unless for the purpose of making a shorter work day on the last day of the week."

The draftsman of this statute apparently used as a model "the bakehouse regulation act" passed by the English parliament in 1863, but he went far beyond that pattern in limiting

the hours of labor, for the New York statute applies to all employés in bakeries, while the English act makes no regulation of hours per day or week, but simply prohibits the employment of persons under eighteen years of age between 9 at night and 5 in the morning: 26 & 27 Victoria, cap. 40. Both acts contain similar provisions to secure cleanliness and ventilation of the rooms used to carry on the business, as well as the separation of sleeping apartments therefrom, none of which are now called in question.

I do not think the regulation in question can be sustained, unless we are able to say from common knowledge that working in a bakery and candy factory is an unhealthy employment. If such an occupation is unhealthy the legislature had the right to prohibit employers from requiring or permitting their employés to spend more than a specified number of hours per day or week in the work, because such a command would be in the interest of the public health and would promote the general welfare. As in the *Jacobs* case, we took judicial notice of the nature and qualities of tobacco (page 113), so in this case we may take judicial notice of the effect of very fine particles of flour and sugar when inhaled into the lungs from the heated atmosphere of manufactories of bread and candy. Necessarily in considering the subject we may resort to such sources of information as were open to the legislature.

Vital statistics show that those vocations which require persons to remain for long periods of time in a confined and heated atmosphere filled with some foreign substance, which is inhaled into the lungs, are injurious to health and tend to shorten life. Bakers and confectioners, who, during working hours, constantly breathe air filled with the finest dust from ¹⁷⁰ flour and sugar, have a tendency to consumption, the most terrible scourge known to modern civilization and resulting in more deaths than any other disease: 1 *People's Cyclopaedia*, 479; *Mulhall's Dictionary of Statistics*, 193 and 683.

Thus in the article on phthisis in volume 18 of last edition of the *Encyclopedia Britannica* it is said: "Occupations which necessitate the inhalation of irritating particles, as in the case of stone-masons, needle-grinders, workers in minerals, in cotton, flour, straw, etc., are especially hurtful, chiefly from the mechanical effects upon the delicate pulmonary tissues of the matter inhaled. No less prejudicial are occupations carried on in a heated and close atmosphere, as is often the case with compositors, goldbeaters, sempstresses, etc."

So in Alden's Encyclopedia, volume 9, title "Consumption," the following occurs: "Often the workshops of tailors, printers, bakers and other businesses carried on in close, ill-ventilated apartments by large numbers of working people are nurseries of consumption."

We quote from a few more out of many authorities to the same effect: "It is certain that much might be done to improve the public health in this respect by more attention on the part of the employers of labor to the comfort and habits of those who are, in more senses than one, their 'hands' and the sources of their prosperity. A certain kind of improvement has, indeed, been already effected by the improved living of the working classes during the last twenty years. Still it is well known and proved by careful inquiries that the workshops of tailors, printers, bakers and other businesses carried on in close, ill-ventilated apartments, by large numbers of workmen are, in a very aggravated sense, nurseries of consumption. . . . The cutters and needle-grinders of Sheffield appear to owe their notoriously short lives to consumption brought on by the inhalation of metallic particles in the close and stifling atmosphere of their workshops. . . . Even admitting, therefore, that the causes of consumption may be part practically irremovable, there seems no reason to doubt that very much might be done to diminish ¹⁷¹ its prevalence, as well as to arrest its course when already formed, by due attention to the comfort of the laboring population, both in their dwellings and in the pursuit of their occupations": 4 International Cyclopedia, 286.

"Particular occupations predispose (to consumption), especially such as occasion constant inhalation of small particles": 2 Johnson's Cyclopedia, 488.

"Thus tailors, seamstresses and similar workers are especially prone to the disease. More especially is this true of occupations whose performance necessitates the inhalation of dust particles. . . . The dust particles act as irritants of the fine structures which line the air passages and vessels, inducing chronic changes, which, in turn, are liable to lead to consumption": 3 Chambers' Encyclopedia, 438.

"The bacillus of tuberculosis finds, indeed, the most favorable conditions for its existence in the squalor of congested slums, in the foul atmosphere of dusty workshops, in close courts, alleys, etc.": 70 Fortnightly Review, 308.

"A very large number of the most efficient workmen employed in quarries, metal works, cotton and wool manufactories, print

trades and many other occupations exposing them to bad air and dust fall victims to this infection": 194 *Edinburgh Review*, 444.

"Since statistics still show that the mortality from phthisis in people who follow certain trades is much greater than in others, there can be no doubt of the causal relationship between occupation and pulmonary disease and of dust being the *causa causans*. . . . In 1866 it was demonstrated that . . . two kinds of occupation had long been recognized as hurtful, viz.: 1. Those that give rise to mechanical or chemical irritation of the air passages by dust, grit or fluff being diffused through the atmosphere; 2. Those in which the operatives are exposed to abrupt changes of temperature": *The Lancet*, vol. 165, p. 1345.

"Living in a close atmosphere and in a high temperature, bakers are subject to lung diseases, more especially phthisis": 5 *Reference Handbook of Medical Science*, 276.

172 "Those engaged in carding of cotton and workers in flax, hemp, tobacco and flour, and chaff-cutters suffer in the same manner, but to a less degree than such as are compelled to inhale more decidedly irritating particles": *Fowler & Godlee's Diseases of the Lungs*, 272.

"Dusty occupations, as in the case of millers, bakers, knife-grinders, stone-masons and the like, are fraught with special dangers to vulnerable persons": 5 *Allbutt's System of Medicine*, 229.

"The inhalation of impure air in occupations associated with a very dusty atmosphere renders the lungs less capable of resisting infection": *Osler's Practice of Medicine*, 269.

"Dusty occupations make people prone to disease. The statistics of Berlin as to street-cleaners, cabmen, coal workers and miners shows this": 35 *Journal Am. Med. Assn.* 1028. "The question as to what business had best be carried on by tuberculosis patients is treated of by Ambler. . . . The butchers, he thinks, generally possess an immunity, at least that has been his experience, but bakers are particularly susceptible": 37 *Journal Am. Med. Assn.*, 1068.

"Other vegetable dusts of less potency, which are little less injurious in results than mineral dusts, are flour and starch, which seem to operate rather by obstruction than by irritation. Bakers, confectioners and pastry cooks represent a body of tradesmen exhibiting hygienic conditions of a common character, the principal of which are exposure to heat from the ovens, dust, steam, variations of temperature, in too many instances unhealthy bakehouses, fatiguing movements necessitated where

kneading is done by hand, disagreeable emanations from materials used, prolonged hours of work, more or less night work, and loss of rest. To these evils of their trade the working bakers often add intemperance and irregular living. My own senses also make me conscious of a disagreeable, sickly smell much like that of heated bones, superadded to the steam and other fumes. There are in brief, many incidents in the occupation of baking which reduce vital energy, predispose ¹⁷³ to lung affections and shorten life": *Arlige Diseases of Occupations*, 255.

The occupations of rope-makers, carpet-makers, bakers, etc., "being essentially dust-producing processes, they one and all induce among workers excessive suffering from pulmonary affections. Although the mortality of these workers from phthisis and other lung diseases is considerably below that of metal workers, nevertheless it is in every case inordinately high, exceeding the mortality of agriculturists by proportions varying from 77 to 120 per cent": *Latham's Register General's Report*, 148.

According to the data presented by Dr. C. Moeller in his work on *Hygiene of the Baker Industry* (page 295): "Of bakers dying between the ages of 45 and 65, twenty-five per cent died from chronic bronchitis or related diseases." He points out "the persistency of the flour dust and starchy particles in the bronchial tubes, and even in the lungs" by quoting a medical authority to the effect "that even two and a half weeks after leaving the employment, starchy particles and other evidences of flour dust had been found in the expectoration of bakers examined."

According to the tables of comparative mortality in the federal census of 1900, the number of deaths among bakers and confectioners was three and two-tenths per cent greater than the average of general industrial occupations. These tables are somewhat favorable to bakers between the ages of 15 and 44, but are unfavorable to them between the ages 45 and over, the average being as stated above: See, also, 1 *Parke's Manual of Practical Hygiene*, 133; 62 *Medical Record*, 334; *Medical Examiner and Practitioner*, Nov. 1902, tit. "Occupations"; *Medical Examiner and Practitioner*, July, 1901, tit. "Occupation as Affecting the Death Rate."

The heaviest death rate in England falls to cabdrivers, painters, printers, tailors and bakers: *Mulhall's Dictionary of Statistics*, 195. Statistics relating to thirty-nine trades in Eng-

land and Wales show that more bakers have consumption than the average of those engaged in other vocations, and the 17^a table of male mortality in Paris shows higher death rate among bakers than in all but five out of twenty of the common callings of life: Mulhall's Dictionary of Statistics, 688.

While the mortality among those who breathe air filled with minute particles of flour is less than among those who work in stone, metal or clay, still it seems to be demonstrated that it is greater than in avocations generally. The dust-laden air in a baker's or confectioner's establishment is more benign and less liable to irritate than particles of stone or metal, hence, while bakers are classified with potters, stone-masons, file-grinders, etc., still they are regarded as less liable to pulmonary disease than other members of the class. The evidence while not uniform leads to the conclusion that the occupation of a baker or confectioner is unhealthy and tends to result in diseases of the respiratory organs. As statutes are valid which provide that women or children shall not be employed in any manufacturing establishment more than a certain number of hours in a single day, so I think an act is valid which provides that in an employment which the legislature deems, and which is in fact, to some extent detrimental to health, no person, regardless of age or sex, shall be permitted or required to labor more than a certain number of hours per day or week. Such legislation, under such circumstances, is a health law and is a valid exercise of the police power.

I vote for affirmance.

Justices O'Brien and Bartlett Dissented, the former saying: "It will be seen that this section of the Penal Code does not specify the acts or omissions which are made crimes, nor does it in any appropriate terms define the crime at all, but refers for that purpose to another law. When we turn to article 8 of the labor law, referred to above, we find that it contains six separate sections, commanding certain things and prohibiting certain things. The particular section which the indictment charges to have been violated by the defendant is the first section of the article, or section 110, and that reads as follows: 'No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work.'

While this section of the labor law does forbid certain things, no penalty whatever is attached to a violation, and, therefore, in order to get a definition of the particular crime charged in the indictment we must examine two general statutes upon different subjects; that is to say, we must read the Penal Code for the penalty or the punishment, and we must read the labor law in order to ascertain the particular act or omission which constitutes the crime.

"One of the grounds of the demurrer is that the indictment charges two crimes. It will be seen that two things or two acts or omissions have been forbidden by the statute; it forbids the master from either permitting or requiring the servant to work more than the time specified in the statute. Assuming for the present that the statute is valid, it makes it a crime for the master to permit the servant to work over the statutory time; and it also makes it a crime for him to require or compel the servant to so work. The two acts or omissions inhibited by the statute are essentially different in nature and character. It is one thing to permit the servant to work; it is quite another thing to compel or require it. Permitting him to work more than the ten hours might be intentional or involuntary. Compelling or requiring him to work would be a deliberate act on the part of the master in violation of the statute. In the one case the punishment might very well be nominal; in the other case it would necessarily have to be substantial, and, hence, it would seem that two acts or omissions so essentially different in nature and character and each constituting a crime in itself could not properly be united in the same charge, and in this view the objection that more than one crime is stated in the indictment is good.

"But the objection was also made that the acts or omissions stated in the indictment do not constitute a crime, and this objection raises the question as to the validity of the statute and is of much more importance than the form or substance of the indictment. It will be seen from an examination of the law that there is no prohibition against the act of the servant himself in working longer than the statutory time. He may work as many hours as he likes during the day and he violates no law and commits no offense whatever. So the broad question is whether a statute which makes it a crime for the master to permit his servant to do what the servant has a perfect right to do can be a valid law. No restrictions are imposed upon the servant with respect to the hours of labor or otherwise. As already remarked he has a perfect right to work as many hours in a day or week as he may want to, but the master must see to it, at the peril of committing a crime, that his servants are driven out of the building the moment the clock registers the requisite ten hours, and that, too, without regard to the conditions and circumstances affecting the business or the interests of the master. It is a crime for the master to require or permit his servant to work over the statutory time, no matter how willing or even desirous the ser-

vant may be to earn extra compensation for overwork. The master is forbidden to contract with his servant for longer hours and extra pay, no matter what may be the wants or necessities of the business, or the judgment or will of the servant with respect to such a contract. It is obviously one of those paternal laws, enacted doubtless with the best intentions, but which in its operation must inevitably put enmity and strife between master and servant. They are not left free to make their own bargains in their own way, but their mutual interests are governed by statute.

"The sweeping character of the legislation in question may be illustrated by a reference to the last section of the article of the labor law referred to in the indictment; that is to say, to section 115. It is there enacted as follows: 'If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly.' There is no penalty for a failure to observe this law in the law itself, but when we look into the amendments of the Penal Code we find that the owner of a valuable building used as a bakery may be at the mercy of the factory inspector, since, if it happens that the rooms are less than eight feet in height, he must tear it down and rebuild it, if the factory inspector so requires it, or be subject to a criminal prosecution, fine and imprisonment down to the third offense, and possibly so long as the orders of the inspector are not carried out. It is quite inconceivable that the legislature understood, when enacting the amendments to the code by reference to another law, that its action would have such a sweeping effect or confer such arbitrary powers upon a ministerial officer that affected the liberty and the property of the individual.

"It is contended in behalf of the defendant that the law under which he was convicted violates section 1 of article 14 of the constitution of the United States, which prohibits any state from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the law, and those provisions of the constitution of this state which enact that no member of this state shall be disfranchised or deprived of any of the rights or privileges, secured to any citizen thereof, unless by the law of the land and the judgment of his peers, nor be deprived of life, liberty or property without due process of law: Const., art. 1, secs. 1, 6. The words 'law of the land' do not mean an act of the legislature passed for the very purpose of working the wrong. The meaning is that no person shall be deprived of any of the rights or privileges secured to him by the constitution, unless the matter shall be adjudged against him upon a trial had according to law. It cannot be

done by mere legislation: *Taylor v. Porter*, 4 Hill. 140, 40 Am. Dec. 274; *White v. White*, 5 Barb. 474; *People v. Toynbee*, 20 Barb. 168; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Warren v. Beck*, 144 N. Y. 237, 39 N. E. 80; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814; *People v. Orange County Road Const. Co.*, 175 N. Y. 84, 67 N. E. 129. The doctrine of these cases condemns the legislation in question as an invasion of the rights, liberties and property of the citizen. The three cases last cited grew out of the same law that is violated in the case at bar, or similar laws, and they cannot be distinguished from it in principle.

"The labor law excludes from its regulations and restrictions all persons engaged in farm work or domestic service (article 1, section 5) and, hence, a very large proportion of the people of the state who labor for a living are not affected by it at all. Why this large class of wage-earners who toil for a livelihood are excluded from the benefits of the statute, and those who employ them exempt from its burdens and restrictions, it is difficult to conceive. The farmers and that large class of people both in the city and in the country who employ domestics may require them to work any number of hours without violating any law. They commit no crime by requiring their servants to work from daylight till after dark or even into the night. The section of the law upon which the conviction in this case is based is aimed at a very small class of persons, namely, those who conduct 'a biscuit, bread or cake bakery or confectionery establishment.' Work of the same general character is exacted from cooks and domestic servants in practically all the private houses in the land and to a great extent in hotels, restaurants and other public places. It would be absurd to say that all, or even the greater part of the biscuit, bread, cake and confectionery consumed in this state comes from what are called bakeries. The law does not even apply to bakers in the small towns and villages who do their own work. It applies only to bakers who find it necessary to employ labor, and they alone are subjected to criminal prosecution in case they permit the servant to work more than ten hours a day, even though the servant is willing and is given extra compensation. The baker is forbidden, under the penalty of fine and imprisonment, to contract or agree with his servant upon the hours of labor in such way as would be mutually beneficial, but his business is practically regulated by statute. If for any reason he suffers or permits his servant to work an additional half-hour beyond the statutory time his liberty and his property are put at the mercy of the servant, who may procure him to be arrested and imprisoned. It does not appear from the record in this case, or in any other way, that there is anything in the business or vocation of a baker that would authorize the legislature to impose such criminal penalties upon him for permitting his servant to work more than ten hours in the day, or to restrict his

freedom of contract, which is a right enjoyed by all other employers of labor. The guaranties of the constitution may be invaded without any physical interference with the person or property of the citizen. He is deprived of his property within the meaning of the constitution when arbitrary and unnecessary restrictions are imposed upon his conduct of any lawful business, and when he is deprived of the right to make contracts for the transaction thereof. Liberty, in its broad sense, means the right, not only of freedom from actual restraint of the person, but the right of such use of his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel those rights or restrict his freedom of action, or his choice of methods in the transaction of his lawful business, are infringements upon his fundamental right of liberty, and are void: *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. They cannot, and should not, escape the scrutiny of the courts merely because they are made to assume, by argument or otherwise, the guise of police regulations.

"The statute in question deprives the defendant of the equal protection of the law, since it enacts that certain acts or omissions on his part concerning the conduct of his business and his relations to his own servants are crimes and punished criminally, which, as to all the rest of the community not within the terms of this law, are entirely innocent. The very small fraction of the community who happens to conduct bakeries, or confectionery establishments, are prohibited, under pain of fine and imprisonment, from regulating the conduct of their own business by contracts or mutual agreements with their employes, whereas all the rest of the community who find it necessary to employ labor in private business may do so. Class legislation of this character which discriminates in favor of one person and against another is forbidden by the constitution of the United States, if not by the constitution of the state; and so it has been held by the supreme court of the United States and by this court: *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666; *Cotting v. Kansas City S. Y. Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 36, 46 L. ed. 92; *Connolly v. United States P. Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679; *People v. Orange County Road Const. Co.*, 175 N. Y. 87, 90, 67 N. E. 129. It is, I think, quite obvious that the legislation in question is, upon its face, in conflict with the constitutional guaranties referred to, unless it can be brought within the scope of the police power. That is the only ground upon which the statute is defended by the learned district attorney. He contends that it is a health law passed for the purpose of protecting the public health, or at least the health of those persons employed in bakeries. The argument is that the defendant was forbidden by the statute to permit his workmen to work more than ten hours in a day, to the end that his customers might have wholesome bread,

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biscuit and confectionery, whereas if they were permitted to work ten and a half hours in the day the product of the bakery would be unwholesome or dangerous to health. What possible relation or connection the number of hours that the workmen are permitted to work in the bakery has, or can have, to the healthful quality of the bread made there is quite impossible to conceive. The baker in the small towns, or even in the large towns, who does his own work and does not employ labor, may work day or night without fear of molestation, since no one thought it necessary to protect the public against his unwholesome product. It has already been observed that the law does not impose any penalties or restrictions upon the workman himself for working too much, and if the purpose was to protect his health against his own avarice, or his own misdirected energy, it is quite remarkable that it did not at least forbid him from working more than ten hours in a day.

"The contention that the defendant was convicted for violating a health law is, at best, I think, but a mere disguise that is not sufficient to save the statute from condemnation. There is nothing on the face of the law nor in its manifest operation to show that it has any relation to the public health. It is no part of the health law but a part of a general statute known as the labor law. The execution of it was not intrusted to any of the health authorities, but to the factory inspector, which shows what its real scope and purpose was. The factory inspector is not the officer charged with the enforcement of health laws. The legislature classified it as a labor law, and it is that and nothing else. Laws which encroach upon the personal or property rights of the citizen, as guaranteed by the constitution, are generally defended upon the ground that they are police regulations; but the courts have prescribed a test by means of which their true character and purpose may be known. The rule is that the court must be able to say judicially that the statute in question is a health law, and has some appropriate relation to the promotion or protection of health. It will not be deceived or misled by mere names or pretenses. The cases are numerous in which the courts have condemned statutes as invasions of the rights secured to the citizen by the constitution, though enacted or sought to be upheld under the guise of health laws or other police regulations. They all arrive at the same result, and that is that the legislature may not under the guise of a statute to protect against some wrong, real or imaginary, arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods: *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741, 8 N. E. 736; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605,

59 N. E. 716, 52 L. R. A. 814; *People v. Buffalo Fish Co.*, 164 N. Y. 101, 104, 79 Am. St. Rep. 622, 58 N. E. 34, 52 L. R. A. 803; *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257, 42 L. R. A. 490. It will not do to say that the legislature in enacting the statute in question may have thought that it was a health law, or had some relation to health. The action of the legislature, or its views or reasons for the passage of the law, does not conclude the courts, but they must determine for themselves whether in any given case the legislation which is claimed to be an exercise of the police power is really what it is claimed to be. Every labor law, however stringent and arbitrary, could just as well be upheld upon the ground that it is a health law; but in all the discussions that have been had in the courts for many years concerning the validity of legislation of this character, there are to be found but very few cases where it was even claimed that the statute was enacted for the purpose of preserving or promoting health, or that it had any relation whatever to that subject. When it is manifest, as it is in this case, that the law has no relation whatever to the subject of health, and that its real object and purpose was to regulate the hours of labor between master and servant in a business which is private and not dangerous to morals, or to health, freedom to contract with each other, defining their mutual obligations, cannot be prohibited without violating the fundamental law.

“The defendant was charged in the indictment with the violation of a single independent section of article 8 of the labor law, namely, the first section, which relates solely to the hours within which the master may permit the servant to work. The validity of that section is not affected or helped out by the character of some of the other sections of the article, since part of a statute may be perfectly valid and another part in conflict with the constitution. It is quite possible that some parts of the other five sections can be regarded as prescribing sanitary regulations, such as ventilation, plumbing, fire-escapes and the like, but such regulations cannot save the first section which deals exclusively with the time within which the servant is to work and virtually makes a contract to be observed by the master alone, leaving the servant just as free as if the law had never been passed. A section, or sections, of a statute may be good that requires and prescribes sanitary regulations binding upon the landlord who owns and lets tenement houses in cities, but this would not save another section of the statute that prescribes the maximum rent that he may demand and receive from his tenants. It is even quite possible that a law might be held good that enjoins upon farmers or persons employing domestic help the duty of preserving their health against infectious diseases by reasonable and proper safeguards, such as ventilation of the rooms where they sleep and the like, but this would not save a separate section of the law prescribing the compensation that the master is required to pay to the

servant so that the section of the labor law with which we are now concerned can borrow no strength from its association with other sections of the statute that may be good. The single section of the labor law that we are now dealing with must stand or fall upon its own intrinsic character and can receive no support from the company in which it is found. If that section had also provided that every employé of a baker would be guilty of a misdemeanor if he neglected or refused to faithfully serve his master for ten full hours in each day no one I apprehend would then claim that it was a health law. And yet every argument and every authority cited in defense of the section in its present form would be just as good then as they are now. The section would then be just as much of a health law as it is now.

"It cannot be repeated too often that if the single section of the law with which we are now concerned and which is the sole basis of the criminal charge in this case, stood alone, the argument that it is a health law and within the police power would not have even a color of reason or authority to support it. But what the learned district attorney urges upon us is that since the section is found in the article associated with other sections prescribing sanitary regulations, we must assume that the legislators, for some unexpressed reason sufficient to them, reached the conclusion that a baker ought not to be permitted or required to work on an average of more than ten hours in a day. Of course this reasoning is without force and does not meet the difficulty. The question is not what the unexpressed reason is that moved the lawmakers, so long as it is impossible for any court to discover that reason or any reason to bring the enactment within the scope of the police power. It is always open to the courts to inquire and determine whether a statute is in fact fairly within the police power. That principle is founded imbedded in all the cases on that subject. If it were otherwise and the real view of the legislature is made the dominant idea, then the court would be deprived of all power to declare any law void provided the legislature called it an exercise of the police power, or some one contended that it was supposed to be such upon some theory that the public interest required its enactment. There would be no limit then to the police power, and every statute, however arbitrary and in violation of the constitutional safeguards for the protection of life, liberty or property, could be upheld on the plea that the lawmakers called it a health law or intended it as such, or thought it was necessary for that purpose. It is incumbent upon the courts to see to it that such laws are really what they profess to be, or if claimed to be police regulations, that they are such within the reasonable scope of that power.

"The bakers' vocation is one that has existed practically in all ages and in all countries. Wherever cereals are converted into bread, the standard food of the human race, except possibly as to those races

that are considered savage or semi-savage, the making of bread is one of the most common employments. The process is familiar to the domestics in every public or private house in the land as well as in the places called bakeries, where bread is made for sale to the public. It has never been supposed that it was a trade or vocation that was or might be dangerous to health, morals or good order, or that there was anything about it to justify legislation restricting the right of the master and servant to make their own contracts, express or implied, with respect to hours of work or the terms of employment. There is nothing in the record before us from which it can be inferred that there was any ground for the passage of the statute as a police regulation for the protection of health, morals or good order, and, hence, it cannot be upheld as an exercise of the police power. It is a plain discrimination against a limited class of people who happen to be obliged to employ labor in the manufacture of bread, biscuit or confectionery in those places called bakeries. This relatively small class are restricted by the statute to the regulations there prescribed with respect to the hours of labor by their employes, and are prohibited from agreeing with them as to the time they are to work even though extra pay should be given for overwork, a right which the law gives to all other persons employing labor. If the legislature can do all this, then the right to enact what wages the servant shall receive per day or per hour must necessarily follow as an inevitable conclusion. A statute fixing the wages of the servant at such a sum as to enable him to live more comfortably could be defended as a health law by the same argument and authority adduced in support of the section of the present law, the violation of which is the only crime charged.

"It is doubtless within the power of the legislature to enact that a ton of coal or a bushel of wheat shall contain a certain number of pounds; but it cannot prohibit parties from entering into contracts to the effect that a ton of coal or a bushel of wheat shall contain more or less than the quantity prescribed by statute. When there is no contract regulating the matter, and there is a dispute between the parties as to what constitutes a ton of coal or a bushel of wheat, the statute would doubtless be available to settle the controversy. So in the case of the master and servant with respect to the number of hours that shall constitute a day's work. The legislature may no doubt define what is or shall constitute a day's work, but it cannot prohibit the parties from making agreements for themselves, and then custom or contract, express or implied, would control the mutual obligations of the parties.

"The facts stated in the indictment do not constitute a crime, and, therefore, the demurrer must be sustained, the judgment of conviction reversed and the defendant discharged."

As to the Constitutionality of statutes limiting the number of hours which shall constitute a day's work, see State v. Atkin, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519; Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885, 59 L. R. A. 775; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; State v. Buchanan, 29 Wash. 602, 92 Am. St. Rep. 930, 70 Pac. 52, 59 L. R. A. 342; In re Morgan, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52; note to Booth v. People, 78 Am. St. Rep. 244, 245. And as to the validity of other statutes limiting the right of contract between employer and employé, see Street v. Varney Elec. Supply Co., 160 Ind. 338, 98 Am. St. Rep. 325, 66 N. E. 895; International Text-book Co. v. Weissinger, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521.

BLINN v. SCHWARZ.

[177 N. Y. 252, 69 N. E. 542.]

CONTRACTS, Ratification of.—A void contract is binding upon neither party, and cannot be ratified. If ratified in form, it is a new contract, and takes effect only from the date of the attempted ratification. (p. 809.)

CONTRACTS.—A Voidable Contract Binds One Party but not the Other, who may ratify or rescind it at pleasure. (p. 809.)

CONTRACTS of Insane Persons.—Idiots and persons of non-sane memory are not totally disabled either to convey or purchase, but sub modo only, for their conveyances and purchases are voidable, but not actually void. (p. 811.)

INSANE PERSONS.—The Deed of a Lunatic Before Office Found is voidable only, and not void. (p. 811.)

INSANE PERSONS.—The Deed of an Insane Person may be Ratified by Him if it was made while he was insane, and his agent, under a power of attorney, also executed during the insanity, received the consideration, and the principal, after becoming sane, sued such agent for an accounting and inserted allegations in the complaint which would have permitted a recovery of the money received by the agent for the conveyance. Though it does not appear by the complaint or otherwise that the principal knew when the action was brought that his agent had received such moneys, still this casts the burden of proof on such principal in an action of ejectment to recover the land so conveyed, and requires him to show that he did not ratify the conveyance after the termination of his insanity. (pp. 812, 813.)

Action of ejectment. The defendant pleaded that she was in possession of the property under a conveyance executed to her by the plaintiff March 31, 1890, in consideration of seventy-eight thousand dollars paid by her, out of which the sum of forty-five thousand dollars was applied to discharge liens on the property. The plaintiff, in reply, alleged that he had no recollection of having executed the deed; denied that he had

received the consideration therefor, and averred that at the date of its execution he was insane and that defendant took advantage of his condition by procuring his signature to a paper purporting to be a conveyance of the premises described in the complaint.

When the plaintiff purchased the property in 1887, he executed to his grantor six promissory notes to secure sixty-five thousand dollars. There was at the trial evidence tending to prove that the plaintiff was insane from the commencement in the year 1890 until some time in the year 1895, but nothing to show that he had ever been adjudged insane. The deed under which the defendant claimed was executed by the plaintiff and his wife, but the consideration for its execution was paid to Henry Ungrich, who acted under two powers of attorney from the plaintiff, one dated April 16, 1890, and the other in February of the same year. Each power was sufficient in form to authorize Ungrich to sell and convey real property and receive the purchase price thereof.

The present action was commenced in October, 1897. At the trial evidence was offered and received on behalf of the defendant showing that the plaintiff, in July, 1897, commenced a suit against Ungrich alleging his appointment as agent and trustee of the plaintiff; that as such he had entered upon possession of plaintiff's property, real and personal, and sold part if not all of it, receiving the consideration and retaining the same for his use and benefit, and refused to account to the plaintiff; and the plaintiff prayed that his agent be directed to make a discovery and accounting of all his transactions as such agent and trustee.

The trial court directed a verdict in favor of the defendant to which the plaintiff excepted, asking to have the question of his insanity at the time of the execution of the deed submitted to the jury. The court ordered the exceptions to be heard by the appellate division. It overruled them, and ordered judgment to be entered against the plaintiff on the verdict.

George Newell Hamlin, George B. Lester and Harmon S. Graves, for the appellant.

Edward W. S. Johnston and Edward P. Orrell, for the respondents.

257 VANN, J. The deed in question and both powers of attorney were executed by the plaintiff when he was of unsound

mind and incapable of attending to his affairs, as the jury ²⁵⁸ might have found. About two years and a half after he recovered his mind he sued his agent and trustee for a general accounting, and the allegations of his complaint would have permitted the recovery, among other moneys, of the sum of seventy-seven thousand seven hundred and fifty dollars paid by the defendant Julia Schwarz upon the purchase of the property in question. The plaintiff did not allege in his complaint in that action that his agent had received that sum, or any specific money, and it does not expressly appear that he knew when he brought the action what sums had been paid, or under what circumstances, or for what property. After that complaint had been put in evidence by the defendants, however, the burden was upon the plaintiff of explaining the same, or of showing what he could in answer thereto, but the record contains nothing upon the subject. As he had never been adjudged a lunatic, he could not proceed on the assumption that he was insane, as he alleged, for that was a question for the jury. The lapse of time between his recovery and his act has an important bearing upon what he is presumed to have known. While neither power of attorney specifically covered the receipt of money paid in consideration of property conveyed by the plaintiff in person, still the general powers were broad enough to authorize the agent and trustee to collect the same.

Although the plaintiff, in the action now before us, excepted to the direction of a verdict in favor of the defendants, he did not rest there but asked to have the question of his insanity at the time of the making of the deed to Mrs. Schwarz submitted to the jury. He did not ask to go to the jury on the whole case, or upon any other question, and by requesting that the question of insanity only should be submitted, he waived the right to have the question of ratification, so far as it was one of fact, sent to the jury. The evidence warrants the conclusion that the plaintiff ratified the act of his agent as well as his own with reference to the deed under consideration, provided the deed and the powers of attorney were not absolutely void, but merely voidable. As we must assume that the plaintiff was insane when he executed those instruments we ²⁵⁹ thus reach the principal question presented by the record, as to whether the contract of a person actually insane, but never so adjudged, is void, or merely voidable, at his election.

Using the term in its exact sense and limiting it to the parties themselves, a void contract is binding upon neither and

cannot be ratified. Even if ratified in form by both, it would be a new contract and would take effect only from the date of the attempt at ratification. A voidable contract, on the other hand, binds one party but not the other, who may ratify or rescind at pleasure. The word "void," however, is used both in statutes and in decisions of the courts, with several meanings and seldom with the exact one. This is illustrated by an opinion of the court of errors, from which we extract the following: "A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. Bacon classes under the head of acts which are absolutely void, to all purposes, the bond of a feme covert, an infant, and a person non compos mentis, after an office found and bonds given for the performance of illegal acts. He considers a fraudulent gift void, as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and, therefore, in a legal sense, is not utterly void but merely voidable. Another test of a void act or deed is that every stranger may take advantage of it, but not of a voidable one: 2 Leo. 218; Viner, tit. 'Void and Voidable,' A. pl. 11. Again, a thing may be void in several degrees: 1. Void, so as if never done, to all purposes, so as all persons may take advantage thereof; 2. Void to some purposes only; 3. So void by operation of law, that he who will have the benefit of it, may make it good": Anderson v. Roberts, 18 Johns. 516, 527, 9 Am. Dec. 235.

Contracts to defraud creditors, those made under duress or while one of the parties was intoxicated and the like are not ~~void~~ void but voidable at the option of the injured party, while contracts to do acts forbidden by law, such as the commission of crimes, or not to do acts required by law, such as refusing to obey a subpoena, are utterly void. So are contracts of insane persons, "made after an inquisition and confirmation thereof, but not when made before office found, even if within the period overreached by the finding of the jury, although they are presumed to be so until capacity to contract is shown by satisfactory evidence": Hughes v. Jones, 116 N. Y. 67, 73, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 637.

and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for fourteen years is preserved and for his exclusive enjoyment of it during that time the public faith is pledged."

That case and many others were considered recently by the United States supreme court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. Rep. 747, 46 L. ed. 1058, Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state—of which *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, is an illustration—he says (*Bement v. National Harrow Co.*, 186 U. S. 91, 22 Sup. Ct. Rep. 755, 46 L. ed. 1058): "Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, ⁴⁷⁷ will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 96 Am. St. Rep. 578, 67 N. E. 136, 62 L. R. A. 632, upon which defendants apparently rest their claim that the judgment of the appellate division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government per-

mits them to enjoy for the reasons stated by Chief Justice Marshall (*supra*), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings v. Union Bluestone Co.*, 164 N. Y. 401, 79 Am. St. Rep. 655, 58 N. E. 525, 52 L. R. A. 262) or to envelopes (*Cohen v. Berlin etc. Co.*, 166 N. Y. 292, 59 N. E. 906), and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, What may be done under the agreement?

Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association. And it appears from the complaint that the practical construction given to this agreement by those operating together under it is that if a dealer is suspected of selling copyrighted books at less than the arbitrary net price it is quite sufficient to exclude him from selling books altogether. The agreement nowhere ⁴⁷⁸ suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description.

The fifteenth paragraph of the complaint alleges "That during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers (for the purpose of securing to themselves an unreasonable and extortionate profit and at the same time with intent to prevent competition in the sale of books and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally and contrary to the public policy and the statutes of the state of New York . . . combined and associated themselves together," etc. The sixteenth paragraph refers to the method of

organization, and the fact of the adoption of a resolution, and an agreement to carry out their object; while the seventeenth states the nature of the agreement as follows: "That as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word "copyrighted" is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices."

It will be seen that while the leading object of this portion of the agreement apparently is to maintain the retail net ⁴⁷⁹ price of copyrighted books it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price.

And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action, and to prevent him from selling to such a person, shall be that the name has been given to him by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

But, it is said, that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business, because of his refusal to abide by the rules of the association. It is of course of no consequence how this course of action may be described by those who invented it, for if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way.

The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states: "That, in pursuance of said unlawful combination and agreement, said Ameri-

can Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continues so to do; and plaintiffs say that in compliance with said agreement neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a ⁴⁸⁰ member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to anyone who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price."

Here, then, we have a practical construction of the agreement—one put upon it by the parties to it—and it is such a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer "who resells or is suspected of reselling copyrighted books at less than the arbitrary net price," whether such dealer be a member of the association or not.

The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means—inasmuch as the members represent ninety-five per cent of the publishers and ninety per cent of the business done in the book trade—that he may be practically driven out of the business if anyone chooses to suspect that a dealer to whom he has sold books has resold them at less than the price fixed.

The members of the association, therefore, have entered into an agreement which by its terms—as we read it, and as they have construed it in their every-day working under it—under-

takes to interfere with the free pursuit in this state of a lawful ⁴⁸¹ business in which any member of the community has a right to engage, a business in which a monopoly is not secured by the federal statutes, namely, that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690 of the Laws of 1899, which provides: "Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void."

The order should be affirmed, with costs.

Justices Gray and Bartlett Dissented. They contend that the statute relied upon introduced no new rule of law and but stated a general policy prevailing before its enactment, and hence that the decision of the court should be controlled by *Park & Sons v. National Druggist Assn.*, 175 N. Y. 1, 96 Am. St. Rep. 578, 67 N. E. 136, that the agreement before the court was merely one designed by the owners of copyrighted books to protect their interests therein, and that, as an incident to their right to do so, they could agree to have no dealings whatever with persons who sold copyrighted books at prices below those fixed by the association.

Combinations and Monopolies in respect to patented articles are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 260-262, on what combinations constitute unlawful trusts. See, too, the case of *Park & Sons Co. v. National Wholesale Druggists' Assn.*, 175 N. Y. 1, 96 Am. St. Rep. 578, 67 N. E. 136.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

FAWCETT v. TOWN OF MOUNT AIRY.

[134 N. C. 125, 45 S. E. 1029.]

MUNICIPAL CORPORATIONS—Subject of Necessary Expense.—A city or town has power to incur an indebtedness for the erection and operation of plants for the supply of water and electric lights for municipal use and to sell to its inhabitants as a necessary municipal expense without the approval of the proposition by a majority of the qualified voters of the municipality. (p. 825.)

Carter & Lewellyn, for the plaintiffs.

S. P. Graves, for the defendant.

125 MONTGOMERY, J. Whether a city or town has the right to incur an indebtedness for the erection and operation of plants for the supply of water and electric lights for municipal use and to sell its inhabitants as a necessary municipal expense, is the question again presented to us for decision. Indebtedness incurred by a city or town for a supply of water stands on the same footing as indebtedness incurred for lighting purposes, and if such indebtedness be a necessary expense, then whether or not a municipality may incur it does not depend upon the approval of the proposition by a majority of the qualified voters of the municipality. It is only in cases where counties, cities or towns undertake to contract debts or **126** pledge their faith, or loan their credit or levy taxes, except for the necessary expenses thereof, that the submission of the proposition must be made to a vote of the qualified voters of such county, city or town: *Wilson v. Commissioners*, 74 N. C. 748; *Tucker v. Commissioners*, 75 N. C. 274.

(8/5)

It is almost impossible to define in legal phraseology the meaning of the words "necessary expense" as applied to the wants of a city or town government. A precise line cannot be drawn between what are and what are not such expenses. The consequence is that as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of progressive people, that things deemed unnecessary in the government of municipal corporations in one age should be so considered for all future time. In the efforts of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage.

On this subject this court, in *Wilson v. Commissioners*, 74 N. C. 748, uses the following instructive and suggestive language: "The analogy of the law of the necessities for infants is the only one that occurs to us. It is held that if, considering the means and station of life of the infant, the articles sold to him may be necessities under any circumstances, they come within a class for which the infant may be liable, and upon his refusal to pay it is for a jury to determine whether under the actual circumstances they were necessary. If, however, ¹²⁷ the articles are merely ornamental and such as cannot under any circumstances be necessary to the one of means and station of the infant, the court may, as a matter of law, declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application. But if treated merely as an analogy in the absence of other guides it may be of some general use."

It seems strange that it should be declared by some of our courts of highest reputation that the purchase of a town clock or hay scales or a pump is a necessary expense, when the supply of light to enable its citizens to walk its streets in security, or a supply of wholesome water to prevent disease and suffering, should be held as not a necessary expense. It is pretty generally held by the courts that the expense incurred for the

widening of streets is a necessary expense, that a market-house is a necessary expense, and surely if that be sound law the courts ought to hesitate before they would pronounce a debt incurred for the furnishing of light and water not to be a necessary expense. And it seems to us that it may be reasonably considered as certain that the words "necessary expense" do not mean expenses incurred or to be incurred for purposes or objects that are only for the procurement or maintenance of things absolutely essential to the existence of the municipality. The expenditure of money for the widening of streets, the erection of market-houses, town clocks and hay scales are all considered as necessary expenses, and those things are not essential to the life of the municipality. A city or town might be fairly well governed and be prosperous without having appointed and fixed particular places for the sale of market produce, or without keeping the time of day, or weighing grain and fodder; and certainly expenses incurred for water and light are more necessary than those for a market-house, clocks and scales. The words "necessary expense," then, must mean such expenses as are or may be incurred ¹²⁸ in the establishing and procuring of those things without which the peace and order of the community, its moral interests and the protection of its property and that of the property and persons of its inhabitants would seriously suffer considerable damage, leaving out of view the matter of the great inconvenience that would be attendant upon our present social life for want of such expenditures. The use of water from wells dug in populous communities is prescribed by the recent progress made in the science of bacteriology, the practical lessons of that science having been learned by the people generally.

It is of common knowledge that the most fearful scourges of certain most dangerous forms of fever arise from the use of water from wells in towns and cities; and it is out of the power of individuals in towns and cities to erect and operate appliances for supply of water. As to the question of lighting the streets and public places, the experience of all who live in towns and cities of any considerable population is that without lights upon the streets and in the public buildings both life and property would be insecure, to say nothing of the almost complete destruction of the conveniences of life and the marring of its social features. The fire department, probably the most important of the municipal departments, would be rendered ineffective, and a considerable part of the commerce—

trade of the country—would be destroyed; for under our changed conditions a good deal of the traffic between different communities and a respectable part of our mail service are conducted at night. It will not do to say that a city or town may expend money or incur a debt for the purchase of lights by the month or the year, but that it may not incur a debt for the construction and operation of a system of water-works or for the installment of an electric plant for lighting. If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such ¹²⁹ lighting is with the authorities of the city or town to determine. The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of "necessary expenses." The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts cannot control the discretion of the commissioners.

Our conclusion, then, is that an expense incurred by a city or town for the purpose of building and operating plants to furnish water and lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred, under section 7 of article 7 of the constitution; and that under the general law of North Carolina in respect to cities and towns, the Code, sections 3800 and 3821, municipal corporations may contract such debts and provide for their payment, unless there is some feature in the charter of such city or town which prohibits it.

The power to light the streets and public buildings and places of a city is one of implication, where it is not specially conferred, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. It is a most important factor, too, in the preservation of the peace and order of the community: *Croswell's Law of Electricity*, sec. 190; *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Lot v. Waycross*, 84 Ga. 681, 11 S. E. 558. In the case of *Crawfordsville v. Braden*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 852, 14 L. R. A. 268, the court said: "So far as lighting the streets, alleys and public places of a municipal corporation is concerned, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and

financial conditions of the corporation." It is well settled that the discretion of ¹³⁰ municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power and discretion are grossly abused to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

The cases on this subject heretofore decided by this court to the contrary of the present decision, one of which was written for the court by this writer, are overruled. The conclusion to which the present chief justice arrived in *Mayo v. Commissioners*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163, is the conclusion at which we have arrived in this case.

In the case before us the defendant, the town of Mount Airy, was authorized by an act of the general assembly at its session of 1901, Private Acts, chapter 216, to submit to the qualified voters of the town the question of issuing fifty thousand dollars of town bonds for the purpose of defraying the expenses of constructing a system of waterworks and installing an electric plant to furnish the town with water and light. The question was submitted and carried, and the bonds were issued and sold. The proceeds were applied for the purposes mentioned in the act, but were insufficient to complete the plants. The board of aldermen of the town then passed an ordinance that they do borrow the sum of fifteen thousand dollars upon pledging repayment by issuing bonds of like amount with interest.

The plaintiffs commenced this action to enjoin the issuing of the bonds, and the injunction was granted by his honor, Judge McNeill, and the defendant appealed. His honor followed the decisions of this court, and the error he committed was not his own; but it was error, nevertheless.

Reversed.

For Authorities bearing upon the decision in the principal case, see Jacksonville Elec. Light Co. v. Jacksonville, 36 Fla. 229, 51 Am. St. Rep. 24, 18 South. 677, 30 L. R. A. 540; *Mitchell v. Negaunee*, 113 Mich. 359, 67 Am. St. Rep. 468, 71 N. W. 646, 38 L. R. A. 157, *Saleno v. Neosho*, 127 Mo. 627, 48 Am. St. Rep. 653, 30 S. W. 190, 27 L. R. A. 769; *Crawfordsville v. Braden*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 849, 14 L. R. A. 268; *Laporte v. Gamewell Fire Alarm Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 583, 35

L. R. A. 686; Lake County Water etc. Co. v. Walsh, 160 Ind. 32, 98 Am. St. Rep. 264, 65 N. E. 530; Sumner County v. Wellington, 66 Kan. 590, 97 Am. St. Rep. 396, 72 Pac. 216; State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99, 55 L. R. A. 336; Hull v. Ames, 26 Wash. 272, 90 Am. St. Rep. 743, 66 Pac. 391.

DUVAL v. ATLANTIC COAST LINE RAILROAD CO.

[134 N. C. 331, 46 S. E. 750.]

RAILROADS—Negligence—Evidence.—Violation by a railroad company of its contract with a town not to run its trains through the streets above a certain speed, is evidence of negligence in an action against it for personal injury to a person upon the street. (p. 831.)

NEGLIGENCE—Imputable.—The negligence of the driver of a vehicle cannot be imputed to a passenger or guest riding therein. (p. 831.)

NEGLIGENCE—Imputable.—One who is injured by the joint or concurring negligence of a private person with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, so as to prevent recovery for an injury received. (p. 842.)

D. L. Ward and M. De W. Stevenson, for the plaintiff.

Simmons & Ward and N. J. Rouse, for the defendant.

331 DOUGLAS, J. This is an action for damages for personal injuries. The jury found that the plaintiff was injured by the negligence of the defendant, and that she contributed to her injury by her own negligence. There are but two exceptions that we think it necessary to pass upon in this appeal, both to the charge of the court. Among other things the court charged as follows: "The plaintiff introduced a contract wherein it is provided that the East Carolina Land and Railroad Company shall not run its locomotive through the streets of New Bern at a speed greater than three miles an hour. That the whistle shall be sounded before entering upon said streets, and the bell upon the engine tolled while ³³² passing through the streets, etc. And it is admitted that the defendant has succeeded to the rights and liabilities of the East Carolina Land and Lumber Company. The court charges you that this is a contract between the city and the defendant company, and that there is no evidence that its provisions have been enacted into an ordinance by the city, and the jury cannot consider the

provisions of the same as bearing upon the question of the negligence of the defendant."

In this we think there was error. The only object the city could have had in limiting the rate of speed at which a train was permitted to run through its streets was the protection of the traveling public. It was similar to an ordinance, in purpose and legal effect at least, in civil actions. We do not feel compelled in this case to go to the extent of saying that the violation of such a provision in a contract gives rise to a cause of action; but we hold that, equally with the violation of an ordinance, it is evidence of negligence on the part of the defendant. If the defendant obtained the grant of its right of way by virtue of such a contract, it has no right to complain at the reasonable enforcement of its conditions and limitations: *Gorrell v. Greenboro Water Supply Co.*, 124 N. C. 328, 70 Am. St. Rep. 598, 32 S. E. 720, 46 L. R. A. 513.

The court further charged the jury as follows: "If you find from the evidence, by the greater weight or preponderance thereof, that the plaintiff was riding in a buggy driven and controlled by her father; that the plaintiff's father was negligent in approaching the crossing and that such negligence contributed to the injury of which the plaintiff complains as a proximate cause thereof, then such negligence of the plaintiff's father is imputable to the plaintiff as her own negligence."

This also was error. Imputable negligence, or identification, as it is sometimes called from analogy to the Roman law, has never been recognized in this state, and has received but ~~333~~ scant recognition in any part of this country. The question was directly presented and expressly decided in *Crampton v. Ivie*, 126 N. C. 894, 36 S. E. 351, in which this court says: "We may regard it as settled law that the negligence of a driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered as practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being the possession of the owner to the extent of making the driver the temporary servant of the passenger."

In the case at bar it appears that the plaintiff was not traveling in a public conveyance but in a buggy driven by her father. We will assume that she was not a passenger for hire, but was riding in her father's buggy as his guest. We do not think this makes any difference either in principle or in legal

liability. She was certainly not in exclusive control of the vehicle, nor could her father be considered in any sense as her servant. We are aware that in a few instances it has been held that while contributory negligence cannot be imputed to one riding in a hired vehicle, it may be imputed to him if he is a mere guest. The overwhelming weight of authority is against any such distinction, and in common with nearly all the courts of final jurisdiction we are utterly unable to see any reasonable basis for such a conclusion.

The only ground for the doctrine of imputable negligence in any of its phases is the assumed identity of the passenger and driver arising out of an implied agency. It is contended, as he selected his own driver he made him his agent, not only for the general purposes of his employment but for all possible contingencies that might happen. Under this doctrine it would seem that if the driver broke the passenger's neck he would be acting within the scope of his agency. This ³³⁴ may be so, but it does not seem so to us. Of course, if the passenger were injured through the negligence of the driver alone, he must look alone to him or to his master for his recovery; but if he is injured through the concurring negligence of the driver and some one else he may sue either. This is equally true whether the plaintiff is a passenger for hire or a mere guest. We see no reason why the latter should be placed at any legal disadvantage. In fact, it would seem that if there were any difference, the passenger for hire, having the legal right to the services of his driver, would be in a position to exercise a greater degree of control than one whose presence was merely permissive. An examination of the origin growth and decadence of the doctrine seems to us to show the correctness of our conclusions aside even from the weight of authority. The doctrine that the negligence of a driver was imputable to the passenger is considered to have originated in the English case of *Thorogood v. Bryan*, decided in 1849, and reported in 8 Com. B. 115. The action was brought against the owner of an omnibus by which the deceased was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be stopped in time to prevent the injury. The court directed the jury that, "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not draw-

ing up to the curb to put the deceased down, or any want of care on the part of the deceased himself had been conducive to the injury, in either of those cases, notwithstanding the defendant by her servant had been guilty of negligence, their verdict must be for the defendant." This case, after being much criticised, was expressly overruled in 1888 by the house of lords in the case of *The Bernine*, 13 App. Cas. 1, in which ³¹⁵ opinions were delivered by Lords Herchel, Bramwell and Watson.

Among other things in his opinion Lord Herchel says: "In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan*, 8 Com. B. 115, which undoubtedly does support their contention. This case was decided as long ago as 1849 and has been followed in some other cases; but though it was early subjected to adverse criticism it has never come for revision before a court of appeals until the present occasion. . . . It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J., said: 'It appears to me that having trusted the party by selecting the particular conveyance the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling that want of care of the driver will be a defense of the driver of the carriage which directly caused the injury.' Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expresses himself: 'I incline to think that for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.' Vaughan Williams, J., said: 'I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by.'

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stagecoach, because he avails ³³⁶ himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some the language used would seem to bear

that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, so far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say that it is a defense because the passenger is identified with the driver appears to be the question, when it is not suggested that this identification results from any recognized principle of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle and the driver of it certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in *Thorogood v. Bryan*, 8 Com. B. 115. Maule, J., says: 'On the part of the plaintiff it is suggested that a passenger ³³⁷ in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. . . . But as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust.' I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of

the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways the unreasonableness of such doctrine is even more glaring.

The only other reason given is contained in the judgment of Cresswell, J., in these words: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in ³³⁸ that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan*, 8 Com. B. 115, was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory.

In his opinion Lord Watson says: "It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan*, 8 Com. B. 115, is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance when he is doing, or threatening to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver."

We have quoted at length from this case because it is the distinct and final repudiation of the doctrine by the highest

judicial tribunal in England, where it originated, as well as from the further fact that the reasoning upon which the learned and able opinions are founded apply equally to cases where the plaintiff is a mere guest. The same may be said of *Little v. Hackett*, 116 U. S. 336, 6 Sup. Ct. Rep. 391, 29 L. ed. 652, which is cited with approval by Lord Herchel in "*The Bernia*." *Hackett*, the plaintiff, was injured by the collision of a railroad train with the carriage in which he was riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing ³³⁹ a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving his negligence could not be imputed to the plaintiff. Upon appeal the judgment was affirmed. Justice Field, speaking for a unanimous court, says, on page 374 of 116 U. S., 6 Sup. Ct. Rep. 394, 29 L. ed. 652: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver or between the passenger and the owner. In the absence of this relation the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled them to consideration. The truth is, the decision in *Thorogood v. Bryan*, 8 Com. B. 115, rests upon

indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no ³⁴⁰ such identity. The parties are not in the same position. The owner of a public conveyance is a carrier and the driver or the person managing it is his servant. Neither of them is the servant of the passenger and his asserted identity with them is contradicted by the daily experience of the world." Again, the court says on page 379, 116 U. S., 6 Sup. Ct. Rep. 397, 29 L. ed. 651: "There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them, to prevent their recovery against a third party he must be their agent in all respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already said, responsibility cannot within any recognized rules of law be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise,' as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach, but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be from a coach stand, for the consequences of an injury which was the product of the ³⁴¹ co-operating wrongful acts of the driver, and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.'"

The court further cites with approval the case of *Dyer v. Erie Ry. Co.*, 71 N. Y. 228, in which the facts are very similar to those in the case at bar, in the following words: "The plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing without giving the driver of the wagon any warning of its approach. The horses becoming frightened by the blowing off of steam from engines in the vicinity became unmanageable and the plaintiff was thrown or jumped from the wagon and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and although he traveled voluntarily, he was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses."

In *Transfer Co. v. Kelly*, 36 Ohio St. 88, 38 Am. Rep. 558, the plaintiff below (Kelly) was injured while riding on a street-car in collision with a car of the Transfer Company and was permitted to recover although it appeared that the servants of both companies were negligent. The chief justice in delivering the opinion of the court, said: "It seems to us therefore that the negligence of the company, or of its servants, should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company, or its servants, was the ³⁴² sole cause of the injury." "Indeed," the chief justice added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly and proximately by the latter's negligence, should be denied on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition it is enough to say that it is simply absurd."

In *Robinson v. New York etc. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, Church, C. J., a distinguished jurist, speaking for an able court, says: "It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse

and carriage. The plaintiff had no control of the vehicle nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person she would not be liable. She was not responsible for his acts and had no right and no power to control them. True she had consented to ride with him, but as he was in every respect competent and suitable she was not negligent in doing so. Can she be held by consenting to ride with him to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her." Again, the court says, on page 13 of 66 N. Y. and 23 Am. Rep. 1: "I am unable to find any legal principle upon which to impute to the plaintiff the negligence ³⁴³ of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she would be precluded from recovering if he thereby contributed to her injury.' If this argument is sound, why should it not apply in all cases to public conveyances as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stagecoach or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this state and should not be extended, nor should the rule of imputable negligence be extended to new cases where the reason for its adoption is not apparent."

In *Union Pac. Ry. Co. v. Lapsley*, 51 Fed. 174, 16 L. R. A. 800, 4 U. S. App. 445, 2 C. C. A. 149, Sanborn, C. J.,

speaking for the court, says: "But where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created, no relation of master and servant is established, the owner and driver of the team are not controlled by and are not in any sense the agents of the invited guest, and to hold him responsible for the negligence of the former by whose permission alone he rides is unauthorized by the law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice and sustained by every precedent. That where the negligence of the ³⁴⁴ person injured has contributed to the injury he cannot so recover, because it is impracticable in the administration of justice to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who upon every consideration of justice and reason ought to make compensation for it, shall be permitted to escape because a third person over whom the injured person had no control and whose only relation to him was that of a guest to his host has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury a loss of one thousand dollars was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed by any act or omission of hers to this injury. She had no control over her brother, the driver, who may have contributed by his carelessness to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realms of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based we have been unable to discover it."

In *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 18 Atl. 720, 6 L. R. A. 143, Clark, J., delivering the opinion of the court, says, on page 524: "Quotations might be given from many cases in the different states illustrating the very firm and emphatic manner in which the doctrine

of this celebrated case has been denied. The authorities in England and the great current of authorities of this country are ³⁴⁵ against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion there is no principle consonant with common sense, common honesty or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another imputed to him under such circumstances. Although in *Carlisle v. Brisbane*, 113 Pa. St. 544, 6 Atl. 372, I may appear to have accepted that doctrine, I mean merely to state that the ground upon which this court had rested that rule was better than that taken by the English courts. But if this were not so, Fields was not a common carrier; Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Fields' home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, 113 Pa. St. 544, 6 Atl. 372, and to the case of *Follman v. Mankato*, 59 Am. Rep. 340, 29 N. W. 317. We are clearly of the opinion that if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him."

This case was expressly approved in *Bunting v. Hogsett*, 139 Pa. St. 363, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34, 12 L. R. A. 268, where the court uses the following language, on page 376, 139 Pa. St., 23 Am. St. Rep. 192, 21 Atl. 33, 12 L. R. A. 268: "But *Thorogood v. Bryan*, 8 Com. B. 115, which is the leading case, has been recently overruled in the English court of appeals: *The Bernina (Mills v. Armstrong)*, 2 Prob. & D. 58; and the doctrine, although formerly accepted in many of the states, is now generally disapproved. The authorities in England and the great current of authority in this country are against it. The cases are collected in *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 6 L. R. A. 143. ³⁴⁶ They are numerous, and it is unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was, to some extent, perhaps, obiter dictum, but we are now unanimously of opinion that the views there expressed, somewhat in advance, contain the proper exposition of the law. The identification of the pas-

senger with the negligent driver, or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As Mr. Justice Field said in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391, 29 L. ed. 652; 'There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant, neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.' The rationale of the rule of *Thoroughgood v. Bryan*, 8 Com. B. 115, is expressly disavowed in our own case of *Lockhart v. Litchenthaler*, 46 Pa. St. 151, and it is now rejected as untenable and wholly indefensible. Nor is there any rule or principle of public policy which will support such a doctrine. If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which should release one of them and hold the other. It is true the carrier may be subjected to a higher degree of care than his cotortfeasor, but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem in principle to be a matter of no consequence that one of them is a common carrier. Neither ³⁴⁷ the comparative degrees of care required nor the comparative degrees of culpability established can affect the liability of either."

It is unnecessary, as well as impracticable, to cite all the other cases we have examined on this subject, and so we will confine ourselves to a few in which the precise question under consideration is directly presented. That one who is injured by the joint or concurring negligence of a private person with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, is held in the following cases: *Masterson v. New York etc. R. R. Co.*, 84 N. Y. 247, 38 Am. Rep. 510; *Strauss v. Newburgh etc. Ry. Co.*, 6 App. Div. 264, 39 N. Y. Supp. 998; *Kessler v. Brooklyn etc. R. R. Co.*, 3 App. Div. 426, 38 N. Y. Supp. 799; *Street Ry. Co. v. Powell*, 89 Ga. 601, 16 S. E.

118; *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; *Cahill v. Cincinnati etc. Ry. Co.*, 92 Ky. 345, 18 S. W. 2; *Noies v. Boscawen*, 64 N. H. 631, 10 Am. St. Rep. 410, 10 Atl. 690; *Ouverson v. Grafton*, 5 N. Dak. 281, 65 N. W. 676; *St Clair R. R. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519; *Carlisle v. Brisbane*, 113 Pa. St. 544, 57 Am. Rep. 483, 6 Atl. 372; *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159, 7 Atl. 105; *Baltimore etc. R. R. Co. v. State*, 79 Md. 335, 47 Am. St. Rep. 415, 29 Atl. 518; *Alabama etc. Ry. Co. v. Davis*, 69 Miss. 444, 13 South. 693; *Follman v. Mankato*, 35 Minn. 522, 59 Am. Rep. 340, 29 N. W. 317; *Commissioners v. Mutchler*, 137 Ind. 140, 36 N. E. 534; 2 *Jaggard on Torts*, sec. 276, p. 982; *Bishop's Noncontract Law*, sec. 1070.

The rule is thus stated in 7 *American and English Encyclopedia of Law*, 447: "Occupants of private conveyances: In the second class of cases there has been and still is much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while on the other hand it may be imputable when the injured person is in a position to exercise authority or control over the driver." Judge Thompson in ³⁴⁸ his *Commentary on the Law of Negligence*, volume 1, section 502, thus lays down the rule: "Negligence of the driver is not imputed to the passenger on a private conveyance riding by invitation. While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver or the owner or the custodian of the vehicle, and having no authority or control over the driver and being under no duty to control his conduct and having no reason to suspect any want of care, skill or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him so as to prevent him from recovering damages from the other tort-feasor."

We cannot better close this discussion than by the following quotation from 1 *Shearman and Redfield on Negligence*, section 66, and in doing so we deem it proper to say that, while we fully approve of the legal conclusions arrived at by the dis-

tinguished authors, we do not wish to be held entirely responsible for the vigor of their language: "Doctrine of identification: As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defense. But in the famous case of *Thorogood v. Bryan*, 8 Com. B. 115, an English court invented a new application of the old Roman doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions we devoted much space to the refutation of this doctrine of 'identification.' But it is needless to do so any longer, since the entire doctrine has, since our first ³⁴⁹ edition, been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally overruled in England a few years ago. The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan*, 8 Com. B. 115, was invented in Wisconsin and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana, and in Nebraska, without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there."

The doctrine of imputable negligence, as far as it relates to a child, has been fully discussed and expressly repudiated by this court in *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699, 41 Am. St. Rep. 799, 19 S. E. 730, 25 L. R. A. 784. Even if this phase of the question were now before us, we could add but little to what was there so fully and ably said.

There must be a new trial.

The Running of a Train through a city in excess of the speed authorized by ordinance is negligence: Chicago etc. R. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318, and see the cases cited in the cross-reference note thereto; Daly v. Milwaukee Elec. Ry. etc. Co., 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832.

The Negligence of a Parent is not ordinarily imputable to his minor child: Ives v. Welden, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408, 54 L. R. A. 854; Wymore v. Mahaska County, 78 Iowa, 396, 16 Am. St. Rep. 449, 43 N. W. 264, 6 L. R. A. 545; notes to Westbrook v. Mobile etc. R. R. Co., 14 Am. St. Rep. 591; Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 408. But see the note to Freer v. Cameron, 55 Am. Dec. 677.

The Negligence of a Driver is not ordinarily imputable to a person riding with him in the vehicle: Brannen v. Kokomo etc. Co., 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; Nesbit v. Garner, 75 Iowa, 314, 9 Am. St. Rep. 486, 39 N. W. 516, 1 L. R. A. 152; Town of Knightstown v. Musgrove, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452; Noyes v. Boscawen, 64 N. H. 361, 10 Am. St. Rep. 410, 10 Atl. 690; Mullen v. Owasso, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 668, 23 L. R. A. 693; Leavenworth v. Hatch, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; Reading Township v. Telfer, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134; Gulf etc. Ry. Co. v. Pendry, 87 Tex. 553, 47 Am. St. Rep. 125, 29 S. W. 1038. Compare Whitaker v. Helena, 14 Mont. 124, 43 Am. St. Rep. 621, 35 Pac. 904. For the application of this rule to cases of collisions with railway trains, see Miller v. Louisville etc. Ry. Co., 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; Dean v. Pennsylvania R. R. Co., 129 Pa. St. 514, 15 Am. St. Rep. 733, 18 Atl. 718, 6 L. R. A. 143; Carson v. Federal St. etc. Ry. Co., 147 Pa. St. 219, 30 Am. St. Rep. 727, 23 Atl. 369, 15 L. R. A. 257; Illinois Cent. R. R. Co. v. McLeod, 78 Miss. 334, 84 Am. St. Rep. 630, 29 South. 76, 52 L. R. A. 954.

COWAN v. ROBERTS.

[134 N. C. 415, 46 S. E. 979.]

GUARANTY is a Promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself, in the first instance, liable to such payment or performance. (p. 847.)

GUARANTY OF PAYMENT—Guaranty for Collection.—A guaranty of payment is an absolute promise to pay a debt at maturity if not paid by the principal debtor, while a guaranty for collection is only a promise to pay the debt upon condition that the guarantee diligently prosecutes the principal debtor for the recovery of the debt without success. (p. 847.)

GUARANTY—Absolute.—The words "I do hereby guarantee any debts" is an absolute, direct, and unconditional promise to answer for the default of the principal debtor. (p. 848.)

GUARANTY—Absolute—Notice of Acceptance.—If an undertaking is to guarantee any contract which may be made the obligation

is not collateral and contingent, but absolute and unconditional, and no notice of acceptance is necessary. (p. 848.)

GUARANTY.—Notice of Acceptance is not required when there is a direct promise of guaranty. (p. 849.)

GUARANTY—Consideration.—The promise of the guarantee to furnish goods to the principal is sufficient consideration to support the contract of guaranty. (p. 849.)

GUARANTY—Fraud of Principal.—If a principal debtor agrees to secure a second guarantor before delivery of the contract of guaranty, without the knowledge of the guarantee, but fails to do so, the guarantor is still bound by his contract. (p. 850.)

GUARANTY—Negligence of Guarantor.—Failure by the guarantor, for a long period, to notify the guarantee that the condition of the delivery of the contract of guaranty, has not been complied with, during which time further credit has been extended, estops the guarantor from taking advantage of the breach of such condition. (p. 850.)

GUARANTY.—Burden of Showing Lack of Diligence by the guarantee in prosecuting the principal debtor so as to release the guarantor, is upon the latter. (p. 851.)

Roberts Brothers were in 1899 indebted to the plaintiffs for goods sold to them, and being unable to make further purchases on credit without security, procured their uncle, the defendant, to sign and deliver a guaranty in the following words:

“Knoxville, Tenn., April 8, 1899.

“I hereby guarantee to Cowan, McClung & Co. any debts which Roberts Brothers now owe or may owe in the future, to the extent of two thousand dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing.

“W. S. ROBERTS.”

Afterward plaintiffs, at different times, sold and delivered to Roberts Brothers various goods, wares, and merchandise and by this action seek to recover the amount named in the guaranty. No notice was given by plaintiffs to defendant of the acceptance of the guaranty.

Merrimon & Merrimon, for the plaintiffs.

F. A. Sondley, for the defendant.

419 **WALKER, J.** The defendant's counsel in his able argument before us relied upon three grounds of defense: 1. That there was no evidence that the plaintiffs had accepted the guaranty and notified the defendant of their acceptance; 2. That there was no consideration to support the guaranty as to the debt already due by Roberts Brothers to the plaintiffs amount-

ing to seventeen hundred and forty-two dollars and fifty cents; 3. That the guaranty was given upon a condition which was never performed, and that it is therefore void even in the hands of the plaintiffs.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance: *Carpenter v. Wall*, 20 N. C. 144. There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt, the former being an absolute promise to pay the debt at maturity if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor, and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecuted the principal debtor for the recovery of the debt without success: ⁴¹⁹ *Jones v. Ashford*, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630. The guaranty may also be absolute in form, or one which binds the guarantor to pay unconditionally, or, at all events, upon the default of the principal, or it may be in the form merely of an offer to become bound upon the default of the principal. In the former case, that is, where there is an absolute guaranty or an unconditional promise to indemnify against loss by the principal's default, no notice of acceptance by the guarantee is required, the liability of the guarantor being fixed and determined by the ordinary rules in the law of contracts. In the latter case, when the transaction takes the form of an offer merely to become responsible for the principal, notice of acceptance of the offer is of course necessary in order to charge the party, who makes the offer, as guarantor, and this is so because the minds of the parties have not met, there is no *aggregatio mentium* until the offer is accepted. There is a well-recognized distinction therefore between an offer or proposal to guarantee and a direct promise of guarantee. The former requires in some cases notice of acceptance, while the latter does not. When the offer to guarantee is absolute and contains in itself no intimation of a desire for, or expectation of, specific notice of acceptance, it may be supposed that the offerer has a reasonable knowledge that his guaranty will be accepted and acted upon, unless he is informed to the contrary: 2 *Parsons on Contracts*, 8th ed., c. 2, sec. 4, and notes, where the subject is fully discussed. It is said that if the party distinctly and absolutely guarantees a

certain line of credit, it presupposes some sort of a request for a guaranty, emanating from the guarantee, and for this reason no formal acceptance by the guarantee is necessary; but if it be only a proposition to guarantee the credits, and not a positive promise to guarantee them, the acceptance of the proposition must, in some ⁴²⁰ way, and within a reasonable time, be communicated before the guarantor can be held liable on it: Tiedeman on Commercial Paper, sec. 420.

In our case, the guaranty is a direct and unconditional promise to answer for the default of the principal to the amount of two thousand dollars. The words of the contract are in praesenti, "I do hereby guarantee," and superadded are the words, "This obligation to remain in full force." Language could not be stronger to express the intention to become liable at once without any expectation of notice that the plaintiffs will accept the guaranty. It was not an offer, nor did it imply an offer merely, but it was in itself a complete and binding promise to guarantee and needed only the sale of the goods by the plaintiffs to make it otherwise effectual: 1 Parsons on Contracts, 466, 467.

We cannot distinguish this case from *Straus v. Beardsley*, 79 N. C. 59, where the court says: "If the undertaking be to guarantee the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional, and no notice is necessary. . . . The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only when the goods have been delivered under its provisions, by actual payment of the purchase price. If the goods are delivered, the contract is to pay for them, and a compliance with this condition is the only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished the goods and that they were paid for, and no notice or demand was necessary to charge them with the debt": See, also, *Walker v. Brinkley*, 131 N. C. 17, 42 S. E. 333.

In *Williams v. Collins*, 4 N. C. 382, 383, this court drew the distinction between a guaranty that a certain person will be able to comply with the proposed contract and one ⁴²¹ wherein the promise is that he shall comply. In the latter case which is ours, the court held that the guarantor, "to all legal consequences, became pledged absolutely to the same extent as the principal debtor was bound, as soon as the guarantee parted with his property." In *Shewell v. Knox*, 12 N. C. 404, all the

judges agreed that, if the guaranty is absolute and addressed to an individual, no notice of acceptance is necessary, and one of the judges held that it was not even necessary when a letter of credit was given under the circumstances of that case. The general principle as to when notice of acceptance of an offer to contract becomes necessary is considered in the cases of Crook v. Cowan, 64 N. C. 743, and Ober v. Smith, 78 N. C. 313. The question as to notice of acceptance in cases of guaranty is very ably and exhaustively discussed, with a full review of the English and American authorities, in the case of Wilcox v. Draper, 12 Neb. 138, 41 Am. Rep. 763, 10 N. W. 579, and the conclusion is reached that when there is a direct promise of guaranty no notice of acceptance is required: Allen v. Peck, 3 Cush. 242; Powers v. Bumcratz, 12 Ohio St. 273; Union Bank v. Coster, 3 N. Y. 212, 53 Am. Dec. 280; City Nat. Bank v. Phelps, 86 N. Y. 484; 2 Addison on Contracts, 8th ed., 84 (*651). The case of Gregory v. Bullock, 120 N. C. 260, 26 S. E. 820, does not apply, as the court held that there was no contract at all in that case, and what is said about the guaranty was with reference to the particular facts under consideration, from which it appeared that there was only "a proposal based upon an uncertain event." The guaranty in this case as to both the past and future indebtedness is evidenced by one and the same instrument and is supported by one and the same consideration, and we do not therefore see why the law applicable to the one should not also determine the liability in the case of the other.

We are of the opinion that the testimony of the defendant ~~as~~ as to his interviews and communications with the principals, Roberts Brothers, and his subsequent promise to pay for the goods after the guaranty had been executed by him, furnishes some evidence to show that he knew the guaranty had been delivered to the plaintiffs and that they were acting upon it, or intended to do so.

There was a sufficient consideration to support the guaranty as to the debt already due. The agreement as to the existing and the future indebtedness was indivisible, and was based upon one and the same consideration, which was that the plaintiffs should sell more goods to the principals to enable them to replenish their stock, which he did. It is not necessary that the consideration should be full or adequate, as in the case of bona fide purchasers for value. If there was any legal consideration, it is sufficient. The promise of the guarantee to fur-

nish the goods was such a consideration and supports the contract of guaranty: 1 Parsons on Contracts, 463, 467.

The third ground of defense is not tenable. If the written guaranty was given to the principals upon condition that it should not be delivered to the plaintiffs until it was signed by J. J. Roberts and they delivered it in violation of the condition, and, thus, as is said in the case, practiced a fraud upon the defendant, the defendant is bound, as the plaintiffs did not participate in this alleged fraud, nor is it shown that they had notice of it. The liability of the defendant is founded upon the principle that where one of two persons must suffer loss by the misconduct or fraud of a third person, or by his breach of confidence, as in our case, the loss should fall upon him who first reposed the confidence or who, by his negligence made it possible for the loss to occur, rather than on an innocent third person. The liability of the defendant in this respect is fully established by the case of *Vass v. Riddick*, 89 N. C. 6. See, ⁴²³ also, *Farmers' Bank v. Hunt*, 124 N. C. 171, 32 S. E. 546; *State v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461.

The plaintiffs agreed to sell the goods to the principals not upon the single consideration that the defendant would guarantee the payment of the price, but upon the further and additional consideration that he would guarantee also the payment of existing indebtedness. He would not have sold but for the last consideration, and therefore by reason of the guaranty he has been induced to change his position, and should the guaranty, as to that indebtedness, be declared invalid, he will be prejudiced, as he no doubt would have taken immediate steps to collect his claim if the guaranty had not been given. It will be impossible for him now to save himself for the reason that the principals have become insolvent and have been adjudged bankrupts. We have said this much, though we do not concede that, in order to charge the defendant on the guaranty, it is necessary to show a change in the guarantee's position by which he may be prejudiced if the guaranty is held to be void.

We have not commented upon the evidence in this case, from which it appears that the defendant knew, on the day after the guaranty was given, that it had been sent to the plaintiffs and had not been signed by J. J. Roberts, and knowing this fact, and "mistrusting" the principals, as he did, according to his own testimony, he delayed for nearly three months to notify the plaintiffs of the alleged condition annexed to the

guaranty, and in the meantime they had sold the goods. When they refused to surrender their security, he finally agreed to pay the bill for the goods sold after the date of the guaranty. This was a clear case of negligence on his part, and the consequences of this negligence must be visited upon him and must not be borne by the plaintiffs, who are innocent parties. As said in *State v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461, ⁴²⁴ the defendant acted upon the assurance that another would do an act which he knew might be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. He confided in the principals, Roberts Brothers, and the condition that J. J. Roberts should sign with him was communicated to them alone. He failed to use ordinary precaution either to protect himself or to protect the guarantee. If the defendant, in any phase of the testimony, can be regarded as an innocent person in this transaction, it yet remains as an inflexible rule of the law that where one of two innocent persons must suffer, he, who has enabled a third person to occasion the loss, must sustain it. This is said to be a doctrine of general application, and is a most just and reasonable one: *State v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461. To permit the defendant to avail himself of his defense to this action would also contravene that other just and inflexible maxim of the law that no man shall take any advantage of his own wrong.

No question arises in this case as to diligence on the part of the guarantee in collecting the debt from the principal, as this is a guaranty of payment and not for collection, and, besides, the burden of proof in this respect would be on the defendant. The case shows that notice of the default of the principal was given, and demand made upon the guarantor before the suit was commenced.

Our conclusion is that there was error in the intimation of opinion by the court adverse to the plaintiffs, by which they were driven to a nonsuit. The judgment must therefore be set aside and a new trial awarded.

Mr. Justice Montgomery Dissented in part and said: "The guaranty upon its face is divisible into two parts: one branch seems to be an obligation for the payment of a debt already existing and due by the principals to the guarantees, and the other branch is in the nature of a security for a debt to be contracted in the future by the principals with the plaintiffs. By the terms of the guaranty in re-

spect to the debt already due, the obligation appears to be an absolute guaranty, and if there was a consideration to support it, the defendant is liable for its payment. . . .

"As to the second branch of the guaranty—that is, the guaranty of the amount of the debt to be contracted in the future by the principals—a notice of acceptance by the guaranties, the plaintiffs, was necessary. That branch of the guaranty was not absolute, and in *Gregory v. Bullock*, 120 N. C. 260, 26 S. E. 820, the court said: 'The answer is that the alleged guarantee gave no notice of his acceptance within a reasonable time.' In *Adams v. Jones*, 12 Pet. 213, 9 L. ed. 1060, Mr. Justice Story said: 'Notice is necessary to be given the guarantor that the person giving credit has accepted or acted upon the guaranty, and given credit on the faith of it. This is no longer an open question in this court.'

"In the case of *Clune v. Ford*, 55 Hun, 479, 8 N. Y. Supp. 719, cited in the argument here, the guaranty was in these words: 'Dear Sir: We hereby agree to guaranty the expenses of the members of the Gaelic Athletic Association to the sum of \$650 (six hundred and fifty dollars), or the amount due under that figure.' The guarantee was the proprietor of a hotel in New York City at which the members of the association were boarding, and were in arrears for board for the sum of four hundred and seventy-five dollars. After the delivery of the guaranty they incurred the further expense of one hundred and seventy-five dollars. The question of notice of acceptance by the guarantee was not raised, the matter of consideration was the only point in the case, and the court held that the incurring of the one hundred and seventy-five dollars expense for the board, after the guaranty was given, was a sufficient consideration for the amount due in the past. In the case of *Paige v. Parker*, 74 Mass. (8 Gray) 211, cited on the argument here, the court held that the guaranty was an absolute one, and therefore that notice was not necessary. The paper-writing in that case guaranteed the prompt payment at maturity of any amount that might be due by the principal for goods, wares and merchandise to be sold by the guarantee to the amount of five hundred dollars. The court in that case said that 'however this may be, we are of opinion that the defendant in this case had notice that his guaranty was accepted. An absolute guaranty was written by *Blodgett & Co.* in their store and for their benefit. The defendant signed it there and left it with them as a complete contract, and they retained it. This was an acceptance by them, for which he must be held to have notice.' "

Notice of Acceptance is generally held necessary to complete a contract of guaranty: *Gorman Sav. Bank v. Drake Roofing Co.*, 113 Iowa, 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335, and cases cited in the cross-reference note thereto; *Merchants' Nat. Bank v. Citizens' State Bank*, 93 Iowa, 650, 57 Am. St. Rep. 284, 61 N. W. 1065; *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E.

665; Taussig v. Reid, 145 Ill. 488, 36 Am. St. Rep. 504, 32 N. E. 918. For authorities holding such notice unnecessary, see London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; Bank of Newbury v. Sinclair, 60 N. H. 100, 49 Am. Rep. 807; Wilcox v. Draper, 12 Neb. 138, 41 Am. Rep. 763. As to the necessity of giving the guarantor notice of default, see Mamerow v. National Lead Co., 206 Ill. 626, 99 Am. St. Rep. 196, 69 N. E. 504.

A Surety Who Signs a Bond on Condition that it is not to be delivered until others sign it is nevertheless bound, according to many authorities, unless the obligee has notice of the condition: Benton County Sav. Bank v. Boddicker, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632, 45 L. R. A. 321; Carter v. Moulton, 51 Kan. 9, 37 Am. St. Rep. 259, 32 Pac. 633, 20 L. R. A. 309; monographic note to Estate of Ramsey v. People, 90 Am. St. Rep. 194, 195. See, however, Spencer v. McLean, 20 Ind. App. 626, 67 Am. St. Rep. 271, 50 N. E. 769; Smith v. Spragins, 109 Ky. 535, 95 Am. St. Rep. 391, 59 S. W. 855.

CARTER v. WHITE.

[134 N. C. 466, 46 S. E. 983.]

JUDGMENTS—Res Judicata.—The decision on appeal from an order continuing until the time of the hearing of an injunction restraining trespass, as to the effect of a judgment in another action and subsequent partition proceedings is not the law of the case, so as to be conclusive on appeal from the final judgment in the trespass suit. (p. 856.)

PARTITION.—Judgment in partition determining the respective interests of parties thereto is binding on them as against an after-acquired title. (pp. 861, 862.)

Pruden & Pruden and Shepherd & Shepherd, for the plaintiffs.

E. F. Aydlett, for the defendant.

⁴⁶⁷ CONNOR, J. The plaintiffs, trustees of Swan Island Club, prosecute this action against the defendant for an alleged trespass upon the land described in the complaint. They demand judgment for damages and other relief. The defendant in his answer denies the ownership as alleged, admits an entry upon the land and sets up title to an undivided interest therein. Appropriate issues were framed and submitted to the jury. The plaintiffs introduced the record of a civil action lately pending and determined in the superior court of Currituck county, wherein the present plaintiffs, James C. Carter and William Minot, Jr., together with W. H. Forbes, trustees of Swan Island Club, were parties plaintiff and the present defendant was party de-

fendant. It appears from an inspection of said record that the plaintiffs alleged that they were the owners in fee and in possession of the land described in the complaint and that the defendant had committed acts of trespass thereon.

The defendant in his answer denied that the plaintiffs were owners and alleged that he was the owner in fee of an undivided interest in the land. He admitted the entry and alleged that the same was lawful.

The cause came on for trial at fall term, 1896, and the following issue was submitted to the jury: "To what part of the land described in the complaint are the plaintiffs, trustees, and the defendant respectively entitled?" and the jury responded: "The defendant to one fifty-fourth part of the whole, and the plaintiffs to the balance thereof." Judgment was rendered in accordance with the verdict, "that the defendant owns in fee simple one undivided fifty-fourth part of said land and the plaintiffs, trustees, the balance of the same." A full description of the land is set out in the judgment. Thereafter the plaintiffs in said action instituted a special proceeding in which the defendant therein being the defendant herein, was party defendant for the ⁴⁶⁸ purpose of having partition of the land. In the petition in said proceedings the plaintiffs alleged that they were tenants in common with the defendant of the land described therein, being the same land described in the complaint in the civil action, and setting forth the interest of the parties. The defendant filed no answer and the court rendered judgment directing partition, appointing commissioners for that purpose. The commissioners made partition, allotting to the defendant by metes and bounds one fifty-fourth part in value of the land and to the plaintiffs the balance thereof; and on September 23, 1898, their report was duly confirmed by the court and the parties adjudged to hold the portions allotted to them by the commissioners. Thereupon the defendant introduced a grant for the locus in quo from the state to John Williams, Thomas Williams and Jeremiah Land, also a deed from Thomas Land to himself bearing date February 1, 1899. The defendant showed that Thomas was one of the heirs at law of Jeremiah Land, one of the persons named in the grant.

The record also states "that it is admitted the defendant is a tenant in common with them to the extent of the interest conveyed to him under the deed from Thomas Land of February 1, 1899, unless the defendant is estopped by the proceedings set up in this action." It was conceded that the present plaintiffs

succeeded to the title of the plaintiffs in said action and proceeding. The plaintiffs moved for judgment, the motion was denied and the plaintiffs excepted.

The court instructed the jury that if they found from the evidence that Jeremiah Land was one of the original grantees from the state to the land in controversy, that he died seised of the same, and that Thomas Land, from whom the defendant bought February 1, 1899, was not a party to the proceedings introduced in evidence, the defendant was ⁴⁶⁹ not estopped. The plaintiffs excepted, and from a judgment for the defendant appealed.

The plaintiffs contend that the defendant is estopped from asserting title to any portion of or interest in the land in controversy, first, by the verdict and judgment in the civil action rendered at fall term, 1896; and, second, by the final judgment in the special proceedings for partition of September 23, 1898.

The defendant admits that he is estopped to assert any title which he owned at the time of the institution of said action and of said special proceeding, or which he has derived from the parties to said action, or any person claiming under said parties, but insists that he is not estopped to assert title derived from Thomas Land, who claims under Jeremiah Land, neither of whom were parties to or in any manner bound by the judgment in said action or proceeding. This is the sole question presented upon this record.

Before proceeding to discuss the authorities relied on by counsel, it will be well to note the disposition of this case made by this court at August term, 1902: *Carter v. White*, 131 N. C. 14, 42 S. E. 442. The case as then presented was an appeal from an order continuing to the hearing an injunction restraining the defendant from trespassing upon the land pending litigation. The court decided that the judge was in error in making said order. It is not contended that the judgment then rendered was final or worked an estoppel upon the plaintiffs to further prosecute this action. The appeal was not from any "judgment" but from a "judicial order" as provided in section 548 of the code. The term "order" is sometimes applied ⁴⁷⁰ to an interlocutory judgment or decree. Indeed, under the codes of the several states interlocutory judgments and decrees are no longer recognized and "orders" have been substituted therefor: 17 Am. & Eng. Ency. of Law, 763. The defendant, however, says that this court in the opinion rendered decided the question now presented, and that the decision became the "law of the case" and

binding upon us in all other and future steps herein. It is well settled that the decision of a question presented by the record and necessary to be decided in the final disposition of the case is conclusive upon the parties.

We will not entertain a proposition to "rehear" a case by means of a second appeal: *Pretzfelder v. Merchants' Ins. Co.*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; *Stezer v. Stezer*, 129 N. C. 296, 40 S. E. 62. This principle, however, cannot be so extended as to include such a case as this. The only question presented by the former appeal was whether his honor should have made the interlocutory order continuing the injunction to the hearing, and in no manner involved the final determination of the case or the rights of the parties upon the trial thereof. We therefore conclude that it is our duty to decide this appeal as if presented for the first time, giving to the views expressed by this court such weight as in our opinion they are entitled. The learned justice, writing for the court, says: "In the action of ejectment the only title in issue was that of the defendants; the plaintiffs' title was not in controversy. It was there found and adjudged that the defendant was a tenant in common with the plaintiffs." The record shows "that the action was in trespass and not ejectment. The plaintiffs expressly put their title in issue by alleging that "they were the owners in fee simple and in the possession of the land." The defendant not only joined issue by denying the allegation of ownership, but by affirmative averment put his title in issue, alleging that he was ⁴⁷¹ the owner of an undivided interest, stating the extent thereof. It is difficult to see how the title of the parties could have been more clearly put in issue. Under the practice prevailing prior to the adoption of the Code, the defendant's answer would have constituted a general denial or plea of "not guilty" and a special plea of *liberum tenementum*. The cause would have been tried upon the general issue and the special plea. A verdict upon the general issue would not have worked an estoppel, for the reason set forth by Pearson, J., in *Rogers v. Ratcliff*, 48 N. C. 225; *Stokes v. Farley*, 50 N. C. 377.

In the last case he said: "If the defendant had relied on his special plea, there would have been an estoppel in respect of his title." The effect of a verdict and judgment in actions involving title to land under the code system is discussed by Pearson, C. J., in *Falls v. Gamble*, 66 N. C. 455, where he says: "Had Gamble brought his action against Falls for trespass on the land, and Falls in his answer had admitted the possession of Gamble and

the committing of the alleged trespass by his orders and put the defense on his title, . . . a verdict and judgment would have worked an estoppel in the same way that it would have done in the old action trespass quare clausum under the plea of liberum tenementum. Indeed, under the Code of Civil Procedure, in an action for land, when the complaint avers title in the plaintiff, the answer admits possession, denies the title of the plaintiff and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title. . . . In an action for land, the plaintiff, if he does not wish the action to try title, should merely allege that he is entitled to the possession and that the defendant withholds it to his damage; and the defendant, if he does not wish the action to conclude the title, should in his answer merely deny the allegation of the complaint so as ⁴⁷² to make it in effect a plea of 'not guilty' or the 'general issue.' "

We therefore conclude that the defendant is estopped by the judgment to deny the facts found by the jury, to wit, "that the plaintiffs are entitled to fifty-three fifty-fourths of the land." The effect of the judgment was to leave the parties in possession as tenants in common, each having, as between themselves, the interests adjudged by the court upon the verdict.

In the view which we take of the effect of the partition proceeding, it is not necessary to decide the effect of this estoppel upon an after-acquired outstanding title, and we forbear to express any opinion thereon.

The question next arises as to the effect of the final judgment in the partition proceeding which was put in evidence. It is therein settled that the plaintiffs and the defendants are the owners and entitled to the possession of the several portions of the land allotted to them by the commissioners. The defendant admits that he has entered upon that portion of the land allotted to the plaintiffs and committed acts of trespass thereon. He seeks to justify such entry by alleging that since said partition he has become the owner of one-ninth undivided interest in said land by virtue of a deed from one Thomas Land, who was at the time of said partition by title paramount the owner of such interest; that neither said Land nor those under whom he claimed were parties to said proceeding. Is the defendant estopped to assert such title against the plaintiffs? The plaintiffs say that he may not do so for that, first, the final judgment in the proceedings in partition settled the rights of the parties to the entire tract of land, that the quantity to which each party

was entitled was fixed by the judgment, and that neither party shall be heard to bring into question the fact so settled and determined, either by showing that he then ⁴⁷³ owned a larger interest or that he has acquired an outstanding title; and second, that there is an implied warranty arising upon the partition, which estops, by way of rebutter, the defendant from setting up such title.

In regard to the first question, it is interesting to trace the development of the law on this subject. We are thereby enabled to better understand and distinguish the conflicting decisions. It was held at one time "that a writ of partition or a petition for partition, which is but a substitute for the former, is a mere possessory action" and that judgment therein did not bar or estop the parties in an action of higher dignity involving title: *Freeman on Cotenancy*, sec. 529. Mr. Freeman says: "In the greater portion of the United States actions for partition, like actions in ejectment, have ceased to be merely possessory actions and have come to involve the right as well as the possession." He has collected in the note (*Nicely v. Boyles*, 40 Am. Dec. 638) an interesting history of the law and a number of decided cases upon the subject. It is not necessary, however, that we go beyond our own reports to find a strong, able and exhaustive discussion of this question. Judge Pearson, writing for the court in *Armfield v. Moore*, 44 N. C. 157, not only vindicates the wisdom in which the law of estoppel is founded, "without which it would be impossible to administer law as a system," but applies it to proceedings for partition. This case is one of the landmarks of our jurisprudence, familiar to every lawyer in the state. It is there settled beyond controversy that a final decree or a petition for partition works an estoppel of record upon the parties thereto, and that neither shall be heard to say that any of the facts therein settled were not true. He says: "Here we have facts agreed on by the parties, entered on the record, partition and decree in pursuance thereof, possession in severalty." . . . Mr. Freeman says: "At the present time ⁴⁷⁴ there can be no doubt that a judgment in a proceeding for the partition of land is as conclusive upon the matter put in issue and tried, as a judgment in any other proceeding, and may be set up as a bar to a writ of entry involving the same question of title. And a suit for partition is perhaps the only proceeding known to the law in which every possible question affecting the title to real estate may be made an issue and determined": *Freeman on Judgments*, sec. 304. This principle is in no manner affected by

what is said by this court in *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57, 12 S. E. 993, 11 L. R. A. 722. That was an action to correct one of the deeds of partition.

The defendant's counsel in his well-considered brief insists that the estoppel operates only upon the title which the parties to the record then owned, and does not affect his right to buy in and assert an existing and outstanding title not affected by the judgment. We have found but one case in our reports in which this question is presented and decided. In *Mills v. Witherington*, 19 N. C. 433, it appeared that partition had been made upon petition of the defendant against the lessor of the plaintiff in the county court; that the report of the commissioners was duly confirmed and final judgment rendered; and the lessor of the plaintiff afterward obtained a grant from the state for the land which had been assigned to the defendant in severalty, alleging that the same was vacant. In the action of ejectment against the defendant, she rested her right to recover on the grant. The defendant set up the judgment in the partition proceeding as an estoppel. Daniel, J., said: "If the land sought to be recovered by the plaintiff was embraced in the report of the commissioners, which report had been confirmed and final judgment rendered thereon, then we think the lessor of the plaintiff, who had been a party to that judgment, was concluded, bound and estopped to controvert anything contained ⁴⁷⁵ in it. The legislature by the act of 1789 gave to tenants in common of real estate the petition for partition, in the place of the ancient writ of partition. The final judgment at common law in a writ of partition runs thus, *ideo consideratum est quod partitio prae-dicta firma et stabilis in perpetuum teneatur*: Thomas Coke, 700. And it was conclusive on the parties and all claiming under them. In *Clapp v. Bronagham*, 9 Cow. 569, the court says that the judgment in partition, it is true, does not change the possession but it establishes the title, and, in an ejectment, must be conclusive. The judgment of the court adjudging a share to belong to one of the parties and allotting it to him to hold in severalty, must be sufficient to authorize him to recover it as to all the parties to the record, the judgment is as to them an estoppel. The act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares that the division, when made, shall be good and effectual in law to bind the parties, their heirs and assigns." Battle, J., in his note to this case, says: "The doctrine of estoppel as laid down in this case is clearly established." Chapter 47 of the Code is pro-

tically a re-enactment of the act of 1789. Mr. Freeman in his work on Cotenancy cites this case in support of the proposition that one of several heirs may be bound by a decree of partition, not only as to rights held by him at the time of partition, but also to the rights subsequently purchased of other heirs who were not parties to the partition, citing the case of *Short v. Prettyman*, 1 *Houst.* 334, in which it was expressly held by the Delaware court that "the decree is binding and conclusive, not only as to the rights which the parties had in the premises at the time of the partition, but also as to the rights which they had subsequently acquired from other heirs of the premises, who were not parties ⁴⁷⁶ to the partition and were not bound by the admissions or the decree establishing it."

The supreme court of Missouri, in *Forder v. Davis*, 38 *Mo.* 107, says: "We decide nothing here, now, concerning the rights of any stranger to the partition, or of any person not a party thereto. But in reference to this plaintiff, we think this judgment operates as a bar against him at law, not only in respect of the estate and title which he then had, but in respect of any title which he might thereafter acquire. There is here no covenant of warranty by deed; but there is such a thing as an estoppel in pais and by matter of record, which, like an estoppel by deed, may have the effect to pass an after-acquired title by operation of law. The partition establishes the title, severs the unity of possession and gives to each party an absolute possession of his portion. A partition is sometimes altogether the act of the parties rather than the act of the law. The binding and conclusive judgment is, in its very nature, very much like the old livery of seisin under a feoffment, which was matter in pais, or like a fine or a common recovery which was matter of record, and these ancient assurances were of that solemnity and high character that they not only passed an actual estate and divested what title the party then had, that operated by way of estoppel to pass all future estate and possibility of right which he might thereafter acquire: *Shepherd's Touchstone*, 2-6, 204-206; *Rawle on Covenants for Title*, 402. And we see no good reason why this solemn judgment in partition, which the statute declares shall be firm and effectual forever, should not be allowed to have the same operation against all parties to the record": See, also, *Reece v. Holmes*, 5 *Rich. Eq.* 540. These authorities would seem to establish the law as laid down in *Mills v. Witherington*, 19 *N. C.* 433.

There is another view, however, of the case which we think equally conclusive. Mr. Freeman says that "the preponderance ⁴⁷⁷ of the authorities is probably in favor of the theory that as each cotenant, who has been evicted after a compulsory partition, may call upon his cotenants to contribute their proportions of his loss, each of them is, by his obligation of warranty, estopped from asserting any independent adverse title to the properties assigned to the others": Freeman on Cotenancy, sec. 533. Mr. Washburn thus states the doctrine: "Where partition has been made by law, each partitioner becomes a warrantor to all the others, to the extent of his share, so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty, no tenant, after partition made, can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been parted off to him. When partition has been made, the tenant, to whom a part has been set out is regarded in law as a purchaser for value of the same": Washburn on Real Property, 723. In *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74, the question is discussed by Marshall, J., and a valuable note is attached by Mr. Freeman. The learned justice says: "But a further, and, as we think, a conclusive evidence of the relation subsisting after partition is furnished by the universal acknowledgment and assertion of the principle that to every partition the law annexes an implied warranty. The implied warranty which the law annexes to the partition is, it is true, in many respects special. It is so, not only with regard to the person or persons who may take advantage of it, but also with regard to the amount of the recompense. . . . The principle being that the loss shall be equally borne by the parties making the partition, and the effect that the losing party may have a repartition. But although the effect of the warranty is limited as to the extent of the recompense and the manner in which it is to be made, it is not limited as to the land ⁴⁷⁸ warranted. It embraces the whole of the land allotted to the warrantee in the partition. As the law makes each partitioner the warrantor of the other as to the extent of the portion allotted to him, whether there be an express warranty in the deed or not, and as no principle is better settled at common law than that a warrantor is barred or estopped to claim against his own warranty, it seems clearly to follow that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion, allotted to him by the same partition, though there

be no express warranty in the deed." We quote this language at length, as it meets the very ingenious suggestion of the defendant's counsel that the implied warranty should not operate as an estoppel, because in the event of the eviction by a stranger the defendant will only be liable to the plaintiffs for one fifty-fourth of the value of the whole land, therefore he should be estopped only to that extent. The effect of a warranty, as an estoppel upon the warrantor, is so fully and ably discussed by Mr. Justice Walker in *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659, that we deem it unnecessary to do more than to refer to his opinion in that case.

We have examined with care every case cited by the defendant's counsel, and while some of them do lay down the law as contended by him, they are based upon constructions of statutes, as in *Massachusetts*. Those not thus distinguished are not in harmony with the best considered authorities and decided cases. We therefore conclude that by the judgment in the special proceeding for partition the defendant is estopped to assert his after-acquired title against the plaintiffs. It is immaterial whether this conclusion is based upon the first proposition or the last, as they bring us to the same result and are consistent with each other. His honor should have instructed the jury in accordance with ⁴⁷⁹ the plaintiff's prayer, and for error in failing to do so there must be a new trial.

DISSENTING OPINION.

CLARK, C. J. The identical point now presented was passed upon in the former appeal in this case, *Carter v. White*, 131 N. C. 14, 42 S. E. 442, and the decision then made by a unanimous court should be the law of this case. It was there said: "In partition proceedings between tenants in common no title passes, only the unity of possession is dissolved and the title vests in severalty, the common source of title resting undisturbed": *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811. Land's interest never passed to plaintiff and was not represented, nor was he a party; therefore he was not bound by the action or special proceeding. As to him they were void, and he had a right of entry and possession equally with the other tenants in common, whomsoever they might be. By this deed passed all the right of Land to the defendant, who then stood in Land's shoes, and had all the rights and remedies of Land, independent of and notwithstanding the judgment in said action and decree of partition."

Thus the identical point now presented has been decided, and in this action the matter is *res judicata*. It cannot be presented by a second appeal. The remedy, if error was committed by this court, would have been by a petition to rehear: *Holley v. Smith*, 132 N. C. 36, 43 S. E. 501; *Perry v. Western etc. R. R. Co.*, 129 N. C. 333, 40 S. E. 191, and cases there cited. Nor does it vary this rule that the former decision was upon an appeal from the continuance of the restraining order in this cause, and this appeal comes up on appeal from a final judgment. The present appeal is solely upon exceptions that the judge charged in exact accordance with the former ruling of this court and his refusal to charge contrary thereto: *Setzer v. Setzer*, 129 N. C. 296, 40 S. E. 62.

⁴⁸⁰ Besides, the former decision was correct. *Richardson v. Cambridge*, 2 Allen (Mass.), 118, 79 Am. Dec. 767, is a case on all-fours and sustains our former ruling: See also, *Christy v. Spring Valley Waterworks*, 68 Cal. 73, 8 Pac. 849.

In 17 American and English Encyclopedia of Law, first edition, 819, it is said: "A party to a partition who subsequently acquires a new and independent title which was in no way represented by any of the parties to the suit may be permitted to assert it." *Henderson v. Wallace*, 72 N. C. 451, holds that one not a party or privy to partition proceedings is in no way affected by the decree. To same effect, 21 American and English Encyclopedia of Law, second edition, 1186: "The familiar principle that judgments and decrees bind only parties and privies is as applicable to judicial proceedings in partition as to other litigation," and cases there cited. Land not having been a party to the partition decree in 1895, his interest was not affected by it. He could recover it or sell it to another, and the defendant could acquire and assert it as well as another. This is not the case of "feeding an estoppel."

In *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57, 12 S. E. 919, 11 L. R. A. 722, it is held that in voluntary actual partition the deeds convey no title but simply ascertain by metes and bounds the interest of each. This has been cited and affirmed by Douglas, J., in *Carson v. Carson*, 122 N. C. 648, 30 S. E. 4; by Shepherd, J., in *Fort v. Allen*, 110 N. C. 192, 14 S. E. 685; and again as recently as *Harrington v. Rawls*, 131 N. C. 40, 42 S. E. 461; and was stated also in *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811. In 21 American and English Encyclopedia of Law, 1193, it is said that "both in voluntary and judicial partition, the decree does not create or divest any title to, or

other right in, the property, but merely severs the unity of possession and determines the share which each tenant is entitled to possess in severalty."

The title of Land could not be divested by the proceeding to which he was not a party, and the purchase of it by ⁴⁸¹ White, after the decree, was not the purchase of an outstanding encumbrance or title, but the purchase of an intact interest in the property which was not the subject of the litigation and decree to which White had been a party in 1895. In that proceeding he only set up the title to the interest he then had. The interest of Land would be good if now held by him, and White cannot be affected by that decree as assignee of Land's interest, any more than would be any other purchaser from Land.

THE EFFECT OF COMPULSORY PARTITION.

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I. The Parties Bound by the Partition.

a. Persons Made Parties to the Suit or Action.—The effect of a judgment in partition, like that of every other judgment, must be ascertained by inquiring and determining (1) whether the court had jurisdiction of the subject matter of the action, and, if so, (2) what parties were before the court so as to be bound by its action, and (3) what were the issues presented in the proceeding and necessarily determined by the judgment. Whether the court had jurisdiction of the subject matter is to be ascertained by examining the constitution and other laws of the state wherein the judgment was pronounced, and will not be considered here. If the court had jurisdiction of the subject matter, then, as in other cases, there can be no doubt that its judgment binds all persons who were made parties to the action or

proceeding and who voluntarily appeared therein or on whom process was served in some mode authorized by law. If a person is so served, it is not essential that he be within the territorial jurisdiction of the court, for each state and nation has jurisdiction over all property within its boundaries, and cannot be impeded in the exercise of such jurisdiction by the fact that some of the claimants or owners are not, or never have been, therein and have not voluntarily submitted themselves to the jurisdiction of the court: *Notes to Alley v. Caspari*, 6 Am. St. Rep. 181; *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 179; *Tremblay v. Aetna L. I. Co.*, 94 Am. St. Rep. 550. One case, and perhaps others, may be found which it is impossible to reconcile with the rule as thus stated (*McBain v. McBain*, 15 Ohio St. 337, 86 Am. Dec. 478), but if they are defensible at all, it must be on the ground that the courts whose judgments were in question had no jurisdiction when proceeding in partition to do anything but dissolve the tenancy in common, and could not decide title or create any new title, or do anything "except to locate such rights as the parties might have in distinct portions of the premises, and to extinguish it in others."

b. Persons not Made Parties to the Action or not Served with Process.

1. **The General Rule.**—In suits in partition, to even a greater extent than in other proceedings, persons not made formal parties may be regarded as represented by other parties, and therefore as bound by the judgment. Who are so represented we shall consider hereinafter. Except as to persons so represented by the parties actually brought before the court no one is bound or otherwise prejudiced by a judgment or decree in partition who was not a party to the action and either served with process or voluntarily appearing therein: *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801; *Green v. Brown*, 146 Ind. 1, 44 N. E. 805; *Fureness v. Severtson*, 102 Iowa, 322, 71 N. W. 196; *Savary v. Da Camara*, 60 Md. 139; *Munroe v. Luke*, 19 Pick. 39; *Hemken v. Brittain*, 12 Rob. 46; *Pacific Bank v. Hannah*, 32 C. C. A. 522, 90 Fed. 72. It is doubtless further essential that a person sought to be bound by a judgment in partition because he was a party to the action, should have been a party in the same capacity in which he is afterward sought to be bound, and that the matters with respect to which he is sought to be estopped were in issue in the former proceeding and therein actually or impliedly determined: *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801; *Savary v. Da Camara*, 60 Md. 139; *Pacific Bank v. Hannah*, 32 C. C. A. 522, 90 Fed. 72.

In affirming that none but the parties to an action or proceeding are bound by the judgment therein, it must always be remembered that such parties cannot escape from the judgment or in any manner diminish its effect by a transfer of their interests either voluntary or involuntary. Hence, the effect of every judgment ex-
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tends from the parties to their privies. "All privies are in effect, if not in name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits nor extends the operation of the estoppel created by a former adjudication, and is, therefore, immaterial. It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit": Freeman on Judgments, sec. 162. The rules binding purchasers and other successors in interest by judgments against their grantors or predecessors apply to purchasers under the parties to suits in partition: Tallman v. McCarty, 11 Wis. 401. Persons acquiring interests from the parties to a suit for partition during its pendency are subject to the rules of lis pendens and may have their title defeated, or determined not to exist, by the final judgment, or their title changed from an undivided moiety to an interest in severalty: Freeman on Cotenancy and Partition, sec. 470; Edwards v. Dykeman, 95 Ind. 509; Partridge v. Luce, 36 Me. 16; Sears v. Hyer, 1 Paige, 483; Coble v. Clapp, 1 Jones Eq. 173; Welty v. Ruffner, 9 Pa. St. 224; Baird v. Corwin, 17 Pa. St. 466.

2. **Husbands or Wives of Parties.**—If a married woman is an owner of an undivided moiety of the property, and, as such, is a party to the suit for partition, her husband, where the common law prevails, has a life estate in the property, and is, therefore, a necessary party if such interest is sought to be affected, and a judgment to which he is not a party cannot affect his interest: Freeman on Cotenancy and Partitions, sec. 477; Ballard v. Johns, 80 Ala. 32; Foster v. Dungan, 87 Ohio, 106, 31 Am. Dec. 432; Pillsbury v. Dugan, 9 Ohio, 120, 34 Am. Dec. 427. On the other hand, one of the cotenants may be a married man or the successor in interest of a married man, whose wife has an inchoate right of dower in his moiety. Where such is the case, this right does not prevent the partition of the property, either voluntary or compulsory. As a result of the partition the right becomes attached to the part set off to be held in severalty to the husband or his grantee holding the moiety subject to this right of dower: Freeman on Cotenancy and Partition, secs. 411, 432. In the absence of some statute to the contrary, a wife having an inchoate right of dower in the premises which she holds subordinate to the right of the cotenants to have them partitioned is not a necessary party to a suit in partition, and, hence, though not made a party, is bound by a judgment therein: Leonard v. Motley, 75 Me. 418; Motley v. Blake, 12 Mass. 280; Huntington

v. Huntington, 9 Civ. Pro. Rep. 182; Matthews v. Matthews, 1 Edw. Ch. 567; Bradshaw v. Callaghan, 8 Johns. 563; Coles v. Coles, 15 Johns. 159, 8 Am. Dec. 231; Wilkinson v. Parish, 3 Paige, 658; Hoxsie v. Ellis, 4 R. I. 124; McClintic v. Manns, 4 Munf. 331; Freeman on Cotenancy and Partition, sec. 472. In such case she is ordinarily represented by her husband and her right is merely transferred to the property set off to him to be held in severalty. Where, however, the property is directed to be sold for the purpose of dividing the proceeds, it is evident that her interest must be sacrificed unless she can be awarded some part of the proceeds of the sale, and no power to make such an award seems to exist unless specially given by statute. It is apparent, therefore, that she ought to have an opportunity to meet the issue as to the necessity of the sale for the purpose of accomplishing an equitable partition. Perhaps where her husband has made a conveyance of her interest in the property and is, therefore, not a party to the suit, the judgment therein does not bind her nor deprive her of the right to assert her claim to dower upon his subsequent death: Verry v. Robinson, 25 Ind. 19, 87 Am. Dec. 346. Unless an exception may be regarded as established by the decision last cited, a wife having an inchoate right of dower is bound by a partition by sale as well as by a partition by metes and bounds, though not a party to the suit: Davis v. Lang, 153 Ill. 175, 38 N. E. 635; Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Williams v. Westcott, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314; Warren v. Twilley, 10 Md. 39; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Sire v. St. Louis, 22 Mo. 206; Matthews v. Matthews, 1 Edw. Ch. 567; Van Gelder v. Post, 2 Edw. Ch. 577; Jackson v. Edwards, 7 Paige, 391; Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Holley v. Glover, 36 S. C. 404, 31 Am. St. Rep. 883, 15 S. E. 605, 16 L. R. A. 776; contra, Boyston v. Boyston, 21 Ga. 172; Greiner v. Klein, 28 Mich. 17; Green v. Putnam, 1 Barb. 506; Wilkinson v. Parish, 3 Paige, 658. Those courts denying that a wife is barred of her right of dower by a sale in partition ordered in a proceeding to which she is not a party do not doubt that if made a party she is bound thereby: Jackson v. Edwards, 7 Paige, 386, 22 Wend. 498; Jordan v. Van Epps, 19 Hun, 526. If the premises sought to be partitioned are claimed as a homestead, the wife of the claimant is a necessary party, and in her absence a judgment purporting to partition them cannot be binding upon her: De Uprey v. De Uprey, 27 Cal. 332, 87 Am. Dec. 81.

3. *Encumbrancers.*—If an encumbrance or lien exists against any of the cotenants, the effect of the partition is to transfer it to the lot set off to him to be held in severalty. Hence, an encumbrancer is not a necessary party to a suit in partition: Freeman on Cotenancy and Partition, sec. 478. This rule does not, perhaps, necessarily result in the further rule that when not made a party he is

bound by the final judgment. It may be that the part set aside is of much less value than was the moiety to which it attached in its inception. In such an event it would appear to be reasonable that he should be allowed to attack the partition in some mode for the purpose of rebutting the presumption that it had not operated inequitably upon him and of obtaining some adequate relief in the event of his success in his attack: *Colton v. Smith*, 11 Pick. 314, 22 Am. Dec. 375; *Monroe v. Luke*, 19 Pick. 40; *Bradley v. Fuller*, 23 Pick. 4. But even where a sale of the property is sought for the purpose of partitioning it, encumbrancers are not, in the absence of some statute to that effect, necessary parties to the suit: *Freeman on Cotenancy and Partition*, sec. 479; *Inman v. Prout*, 90 Ala. 362, 7 South. 842; *Thurston v. Minke*, 32 Md. 574; *Owsley v. Smith*, 14 Mo. 155; *Matter of Harding*, 3 Ired. (25 N. C.) 322. The reasons given for these decisions, namely, that encumbrancers are not affected by a sale, imply that they are not prejudiced by the judgment and may, notwithstanding, enforce their liens in some manner, unless paid from the proceeds of the sale or otherwise. In many, and perhaps all, of the states statutes have been enacted providing for the making of encumbrancers parties (*Freeman on Cotenancy and Partition*, sec. 479; *Kingsbury v. Buckner*, 70 Ill. 514; *Metcalf v. Hoopingardner*, 45 Iowa, 510; *Eberts v. Fisher*, 44 Mich. 551, 7 N. W. 211; *Harbeson v. Sanford*, 90 Mo. 477, 3 S. W. 20; *Whitton v. Whitton*, 36 N. H. 127, 75 Am. Dec. 163), and where such is the case, they are doubtless not bound by a judgment unless made parties, and, on the other hand, if made parties and served with process, must present their claims to the consideration of the court, and are bound by its decision refusing to recognize or provide for them: *Barnard v. Onderdonk*, 98 N. Y. 164.

4. **Persons not in Esse, When and How Bound by.**—Persons not in being when judgments in partition are rendered may unquestionably be bound by them, and this without any publication of notice to bring in unknown owners. We need not proceed to consider precisely what persons must be before the court nor what proceedings must be taken to bind persons not yet in being. It is sufficient for our present purpose to state that there is little, if any, dissent from the proposition that persons not in esse may be bound by judicial proceedings taken against others who, in contemplation of law, represent them: *Freeman on Judgments*, sec. 306; *Freeman on Cotenancy and Partition*, sec. 482; *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R. A. 127; *Dunham v. Doremus*, 55 N. J. Eq. 511, 37 Atl. 62; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693, 32 N. E. 704, 18 L. R. A. 331; *Goebel v. Iffla*, 48 Hun, 21; *Irwin v. Clark*, 98 N. C. 437, 4 S. E. 30;

Bidley v. Halliday, 106 Tenn. 607, 82 Am. St. Rep. 902, 61 S. W. 1025, 53 L. R. A. 477; *Harrison v. Walton*, 95 Va. 721, 64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703, and this rule is as applicable to proceedings for partition as to other suits: *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Clemens v. Clemens*, 37 N. Y. 59; *Freeman v. Freeman*, 9 Heisk. 301; *Carneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819, 20 S. E. 959. But in order to bind the interests of persons not in esse the proceedings must be adapted to that purpose. If no mention is made of such interests, and the pleadings and judgment are founded upon the theory that the persons in being before the court are the only persons having any estates or interests in the property, then no interests are affected except those vested in the parties before the court. Whenever it is sought to bind the interests of persons not then in being, the judgment must be one which "provides for and protects such interests by substituting the fund derived from the sale of this land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise": *Barnes v. Luther*, 77 Hun, 234, 28 N. Y. Supp. 400; *Monarque v. Monarque*, 80 N. Y. 326.

5. *Child en Ventre sa Mere*.—Some doubt may arise as to when a child becomes in esse so as not to be bound by a judgment against its parents or others ordinarily authorized to represent the interests of persons not in being. For some purposes a child must be treated as in being from the moment of its conception, provided it is subsequently born alive. A petition in partition alleging that the property in question had belonged to J. M. G., who had died leaving one child and heir, and that it is believed there is another en ventre sa mere, does not show such a legal existence of an unborn child as to give the court jurisdiction to order a sale or division between it and the other child named in the petition: *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20. This does not necessarily imply that the interests of a child en ventre sa mere may not be cut off by a partition had before its birth. In Illinois, it has been said that such cannot be the case (but the suit was not in partition) where its title on its birth was not derived from or under any party to the suit: *Detrick v. Migatt*, 19 Ill. 146, 68 Am. Dec. 584. In South Carolina, the courts at one time declined to proceed with a suit to partition the property of a decedent until twelve months after his death, so as to avoid the possibility of entering a judgment which might conflict with the title of a subsequently born heir, and after this practice was discontinued, it was held that a child en ventre sa mere must be regarded as a person in being who could not be bound by a judgment in partition to which he was not a party: *Pearson v. Carlton*, 18 S. C. 47. It is believed, however, that this rule

cannot prevail, and that such a child must be regarded as not in being for the purpose of the suit and as being represented by the parties before the court, if it has before it all who, by the facts then known, appear to have any interest in the property: *Knotts v. Stearns*, 91 U. S. 638.

6. **Holders of Contingent Interests.**—Where estates are dependent on a contingency and persons are in being in whom such estates may vest on the happening of the contingency in their lifetime, it is obvious that no part of the property can be set aside to them while it remains uncertain whether the contingency will occur, and this has been held to be a sufficient reason for proceeding in their absence and for holding them bound by the result of the proceeding: *Thomas v. Poole*, 19 S. C. 323. The weight of authority is in opposition to this view, and maintains that every contingent remainderman or beneficiary of a trust, who, upon the happening of a known contingency, may become entitled to the property or some interest therein, must, if in being, be made parties to the suit. Otherwise, they are not bound by the judgment: *Moore v. Appleby*, 108 N. Y. 237, 15 N. E. 377; *Miller v. Wright*, 109 N. Y. 194, 16 N. E. 205; *Campbell v. Stokes*, 66 Hun, 381, 21 N. Y. Supp. 493; affirmed, 142 N. Y. 23, 36 N. E. 811; *Levy v. Levy*, 79 Hun, 290, 29 N. Y. Supp. 384, 31 Abb. N. C. 468; *Donahue v. Fackler*, 21 W. Va. 124.

7. **Unknown Owners.**—The statutes of many of the states authorize the process in suits for partition to be directed to unknown owners or to all owners and claimants, known and unknown, in certain contingencies therein designated, and to be served by the publication thereof or of some notice requiring all persons to appear and disclose and assert their claims to the property. Wherever such statutes exist and have been complied with, the proceeding becomes one in rem, and is conclusive against all persons irrespective of the character or extent of their title: *Baylis v. Bussey*, 5 Greenl. 153; *Foxcroft v. Barnes*, 29 Me. 128; *Cook v. Allen*, 2 Mass. 467; *Foster v. Abbott*, 8 Met. 598; *Cole v. Hall*, 2 Hill, 627; *Rogers v. Tucker*, 7 Ohio St. 428; *Nash v. Church*, 10 Wis. 303, 78 Am. Dec. 678; *Marvin v. Titsworth*, 10 Wis. 320; *Kane v. Rock River C. Co.*, 15 Wis. 179.

II. The Issues or Questions Settled by the Partition.

a. **Issues Involved and Determined at the Common Law.**—The principle controlling the effect as res judicata of a judgment or decree in partition is precisely the same as that controlling other judgments or decrees, namely, the issues presented and necessarily involved are conclusively determined and settled (*Foxcroft v. Barnes*, 29 Me. 128; *Flagg v. Thurston*, 11 Pick. 431; *Burghardt v. Van Deusen*, 4 Allen, 375; *Dixon v. Warters*, 8 Jones (53 N. C.), 450; *Herr v. Herr*, 5 Pa. 428, 47 Am. Dec. 416), while issues not so presented and involved cannot be determined or settled. At common law, an

action in partition was a possessory action, and the resulting judgment had no greater effect than judgments in other possessory actions relating to real property: *Avery v. Akins*, 74 Ind. 284; *Utterbach v. Terhune*, 75 Ind. 363; *Fleenor v. Driscoll*, 97 Ind. 27; *Pierce v. Oliver*, 13 Mass. 212; *Nash v. Cutler*, 16 Pick. 500; *Richman v. Baldwin*, 1 Zab. 398; *Goundie v. Northanoton W. Co.*, 7 Pa. St. 238; *Nicely v. Boyles*, 4 Humph. 777, 40 Am. Dec. 638; *Whitlock v. Hale*, 10 Humph. 64; *Mallet v. Foxcroft*, 1 Story (C. C.), 475, Fed. Cas. No. 8989. A petition for partition necessarily tenders an issue whether the plaintiff and the defendant hold the property described therein as cotenants, and if such issue is confessed by the defendants, and, whether confessed or not, is established by the judgment of the court finding the co-ownership and directing partition in accordance therewith, and by a final judgment in which a partition so made is declared effectual, none of the parties can subsequently deny the existence of such holding or that they were not the cotenants thereof as found by the interlocutory judgment: *Oliver v. Montgomery*, 39 Iowa, 601; *Burghardt v. Van Deusen*, 4 Allen, 374; *Edson v. Munsell*, 12 Allen, 600; *Cole v. Hall*, 2 Hill, 627. Nor have we been able to discover any decision holding that either of the parties can afterward maintain that, though there was a possession as co-owners, he held a title in severalty, or, if not in severalty, that he had some greater interest assertible therein than that affirmed by the judgment in partition.

b. *Issues or Questions Settled in Statutory Proceedings for Partition.*—Very generally statutes have been enacted in the several states by which proceedings in partition have been broadened so as to involve questions of title and various other questions, and where such is the case, the effect of the final judgment is necessarily extended so as to harmonize with, and accomplish, the purposes of the statute. Hence, the effect in each state of a final judgment in partition must be determined by inquiring what were the issues which the parties presented and were authorized to present under the statute then in force. For all issues so presented, and determined, either expressly or by necessary implication, are conclusively and finally settled by the judgment. Thus, if, as in West Virginia, the statute authorizes a court of equity in a partition case to pass on all questions of law touching the legal title of anyone claiming to share in the partition to the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff as holding under the same right or title under which the partition is to be made, the judgment of the court, while it must be conclusive as to the questions upon which it is thus authorized to pass, cannot affect a stranger claiming under an adverse title, nor can it be made to involve a determination of such title by bringing him in as a party to the suit: *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. If, by the statutes of

the state, partition is regarded solely as a proceeding in law, the judgment therein cannot affect or be conclusive upon any equitable title held by anyone of the parties: *Greenup v. Sewell*, 18 Ill. 53. The general policy of the American statutes, especially those of a comparatively recent date, is to permit the parties in proceedings for partition to present and have determined every material question relating to the title, so that, as the result of the proceeding, each person having an allotment made to him, and each purchaser acquiring title under a decree of sale, may rest assured that he has acquired the title and interest of every person who has been before the court. All issues may be presented and determined which are necessary to the accomplishment of this result, and the determination, when made, is final and conclusive, and none of the parties can maintain any subsequent action or proceeding inconsistent with the determination thus made: *Irvin v. Buckles*, 148 Ind. 389, 47 N. E. 822; *Finley v. Cathcart*, 149 Ind. 470, 68 Am. St. Rep. 292, 48 N. E. 586; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. 90; *Lindell R. E. Co. v. Lindell*, 142 Mo. 61, 43 S. W. 368; *Whittemore v. Shaw*, 8 N. H. 397; *Clapp v. Bromagham*, 9 Cow. 530; *Butler v. Butler*, 58 N. Y. Supp. 1094, 41 App. Div. 477; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155; *Reese v. Holmes*, 5 Rich. Eq. 540; *Edgerton v. Muse*, *Dud. Eq.* 179. Even in the states where this rule confessedly prevails, courts have inadvertently, and without giving proper attention to what they were saying, employed language appropriate only to partition at the common law, as where they have stated that: "It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title": *Wade v. Deray*, 50 Cal. 380; *Mound City etc. Assn. v. Phillip*, 64 Cal. 495, 2 Pac. 270; *Christy v. Spring Valley W. W.*, 68 Cal. 75, 8 Pac. 849; *Kenney v. Phillip*, 91 Ind. 511. This, if true at all, can only be so when, from the state of the issues, it is clear that no question was presented for consideration, the decision of which might operate to create some new title. To illustrate, it may happen that the plaintiff and certain other persons alleged to be cotenants had no title whatever to the property, and that another person made a party defendant was the owner thereof in fee by an adverse title, and, nevertheless, either through the failure to present his claim or from some error of law or fact on the part of the court, such claim, though presented, was adjudged to be unfounded, either in express terms or by implication, by a judgment declaring the property to belong to, and requiring the partition to be made among, the other parties. If so, then for all practical purposes, the result of the proceeding is that the title which, before its commencement was vested in one person, has by the judgment become vested in others, for, as against them, he who was the true owner has become estopped from asserting his ownership, and they to whom the property was awarded in partition may thereafter

hold it as against his title: *Morehout v. Higuera*, 32 Cal. 290; *De La Vega v. League*, 64 Tex. 217; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

Doubtless, courts may not at all times agree as to whether the issues in a suit for partition were such that the effect of the judgment must be restricted to the common-law rule. If the complaint alleges that the plaintiff and certain designated defendants are the owners of the property as tenants in common, and that certain other persons, also made defendants, make some claim of title to it, this is equivalent to alleging that the latter have no title, and they must meet the issue thus presented, and a judgment awarding the whole of the property to others is a conclusive and final determination that only they have any title. Various incidental questions may be presented in suits for partition, such as that some of the cotenants have made expenditures on account of the common property for which they are entitled to be compensated either in money or by having set aside to them the part on which such expenditures were made. If any claim of this character is made in the pleadings, the judgment finally entered must be conclusive upon it; but what is the effect of a final judgment when a claim of this character is not presented by the pleadings, and hence, apparently not subjected to the consideration of the court? With respect to any claim for owelty, this is necessarily precluded from any further consideration by the final judgment, for the division made among the cotenants by it necessarily affirms that the shares allotted to each is equivalent in value to his own interest in the property, and to permit him to subsequently prosecute any claim, on the ground that the partition was unequal, would be to suffer a relitigation of the question necessarily determined against him by the judgment: *Burger v. Beste*, 98 Mich. 156, 57 N. W. 99. It is not clear that a claim for improvements must be presented in a suit for partition, but as it is a material question and might affect the mode, and perhaps the equality of the partition, we believe that a cotenant who does not present this question cannot afterward claim compensation in any independent suit: *Spitts v. Wells*, 18 Mo. 468. If any of the defendants has a lien on the property, he should present it. If the decision is in his favor, the existence of the lien is established and cannot be subsequently controverted by any of the parties: *Lloyd v. Davis*, 123 Cal. 348, 55 Pac. 1003. If, on the other hand, the decision is against the lien, either expressly or by requiring such a disposition of the property as necessarily ignores it, the claimant cannot have any redress unless by appeal where the lien is recognized, it cannot be afterward asserted except subject to the rights declared in the judgment of partition. If the property is sold, satisfaction of the lien must be sought out of the proceeds of the sale (*Thompson v. Frew*, 107 Ill. 478; *Macgregor v. Malarkey*, 96 Ill. App. 421; *Arnold v. Butterbaugh*, 92 Ind. 403; *Finley v. Babin*, 12 La. Ann. 236), and if the property is allotted

to the various tenants in common, the lien can be asserted only against the allotment made to the person against whose moiety it attached when created: *Rochester L. & B. Co. v. Morse*, 181 Ill. 64, 54 N. E. 628; *Diamond v. Diamond*, 27 La. Ann. 125.

III. The Effect Where the Title, or Some Part of It, is not Bound by the Judgment.

a. **Of the Right to Contribution.**—Confessedly, neither a judgment in partition nor any other judicial proceeding can bind persons who, in contemplation of law, were not parties to it. It follows that a stranger to the suit remains entitled to assert his rights to the same extent as if it had not been instituted. As between one another, the different parties to the suit will not be permitted to allege that any of them held any title capable of being asserted therein in addition to that there found in him, but either may, for some purposes, show that there existed a third party not bound by the judgment, and that, because of this fact, it has not vested perfect title in the whole or in some part of the property, and the other parties may be required to do what in equity ought to be done in consideration of this fact. Thus, a title not affected by the partition may extend to some only of the allotments made, in which event it will appear that the persons receiving such allotments have acquired no title, or a title less in extent than that which they rightfully expected to receive, while the title of the other allottees is perfect. By the common law, and English statutes, enacted so early that they may be regarded in this country as a part of it, every cotenant who, after compulsory partition, was evicted by title paramount, had the right of recompense for the part lost, which right, however, was not available to his grantees (*Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245, 25 S. W. 889; *Dugan v. Hollins*, 4 Md. Ch. 147; *Marvin v. Marvin*, 52 How. Pr. 97; *Nixon v. Lindsay*, 2 Jones Eq. 230; *Walker v. Hall*, 15 Ohio St. 362, 86 Am. Dec. 482; *Ketchin v. Patrick*, 32 S. C. 443, 11 S. E. 301; *Sawyers v. Caton*, 8 Humph. 256, 47 Am. Dec. 608; *Grigsby v. Peak*, 68 Tex. 235, 2 Am. St. Rep. 487, 4 S. W. 474; *Harris v. Hicks* (Tex. Civ. App.), 49 S. W. 110; *Western v. Skiles*, 35 Fed. 674), but was said to be enforceable against alienees of the persons the title to whose allotment was perfect as well as against such persons themselves: *Sawyers v. Cator*, 8 Humph. 256, 47 Am. Dec. 608.

b. **The Effect of the Subsequent Acquisition of Title Paramount by One of the Parties.**—Where title paramount exists, a party to the partition, instead of seeking indemnity by an action for contribution, may acquire such title and undertake to assert it against his former cotenants or their alienees. The person who held such title when the judgment in partition was rendered was certainly not bound by it, because not a party thereto, nor can any alienee of his be bound by the judgment under the rules of *res judicata*, for it must

be conceded that, by those rules, a party to judicial proceeding is not estopped to assert rights and titles subsequently acquired: Freeman on Judgments, secs. 302, 329. This rule applies, as we have shown, to suits for partition, for, unless the parties to those suits were permitted to show, notwithstanding the judgment therein, that there were adverse paramount titles not affected thereby, it would be impossible for them to maintain suits for contribution on the ground that the title of the allotment made to them had wholly or partly failed. If, therefore, a party to a partition suit subsequently acquiring paramount title is estopped to assert it, this is not because of anything which has been adjudged or determined in the suit, but for the reason that the judgment confirming the allotments in partition must be taken to operate as a conveyance to each of the allottees from all the others, carrying with it an implied warranty of title. Where partition is made voluntarily by conveyance executed by the supposed tenants in common, it is, in some states, affirmed (Freeman on Cotenancy and Partition, sec. 410; *Tewksbury v. Provizzo*, 12 Cal. 25; *Rogers v. Turley*, 4 Bibb, 356; *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 425, 25 S. W. 889; *Venable v. Beauchamp*, 3 Dana, 321. 28 Am. Dec. 74), and in others denied (Freeman on Cotenancy and Partition, sec. 409; *Doane v. Willcutt*, 5 Gray, 328, 66 Am. Dec. 369; *Picot v. Page*, 26 Mo. 422; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 322; *Dawson v. Lawrence*, 13 Ohio, 546, 42 Am. Dec. 210), that an implied warranty exists as in cases of compulsory partition, with the weight of authority and reason slightly inclining to the latter view. Where the former rule prevails, it may well be claimed that a final judgment in partition must operate as fully as might a conveyance of the same date executed by all the parties to the action, and if such a conveyance would have carried the title involved in the subsequent controversy, so must such a judgment. Upon reasoning like this, it was held that a title acquired by a party to a suit in partition during its pendency and after his answer was filed therein, but before the rendition of the judgment, though, strictly speaking, an after-acquired title not capable of being asserted in the suit under the pleadings as they stood when judgment was pronounced, nevertheless vested in the allottees, because it would so have vested had all the parties executed a conveyance on the date on which the judgment was rendered: *Christy v. Spring Valley W. W.*, 68 Cal. 73, 8 Pac. 849. In this case, it will be observed, it was not necessary to affirm that the judgment carried an after-acquired title on the ground of the implied warranty, for a conveyance executed at the date of the judgment, though by quitclaim only, would have transferred to the allottees the title in question.

The statute of Henry VIII, which was understood to extend to other cotenants a right theretofore existing in favor of a coparcener who, after partition, was evicted under title paramount, provided

"that every of the said joint tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the others, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law." We see nothing on the face of this statute implying, strictly speaking, any warranty in favor of one cotenant and against the others, but merely a recognition of the right to recover contribution when an allottee lost his allotment by title paramount, as against other allottees who, in the allotments to them, had had the benefit of his moiety in the part of the premises the title to which had not failed. The result of the proceeding authorized by the statute was to place the parties as nearly as possible in the position in which they would have been placed by the partition had it then been known that their title did not extend to the whole of the premises. Beyond this there was no warranty of title and no right recognized or created by virtue of which any of the parties could maintain any action against another on the establishment of title paramount in a stranger to the action to the whole of the property. Where, under such circumstances, one of the allottees or his successor in interest acquires title paramount, it may be that he ought to be held to have acquired it for the benefit of the others if they choose to participate in the cost of the acquisition, as would be the case had it been acquired by any of the cotenants before partition: *Freeman on Cotenancy and Partition*, sec. 154-156. If it is equitable to permit a cotenant before partition to acquire and assert a paramount title unless his cotenants will assume their share of the expense of the acquisition, it is equally equitable to permit an allottee, after partition, to protect his title by acquiring title paramount and asserting it until such time as the other parties in interest make, or offer to make, what must be regarded as an equitable contribution. This view of the question has not, so far as we are aware, been presented to or considered by the courts. After ourselves reconsidering the subject, we reach the conclusion that the weight, both of reason and of authority, notwithstanding the decision in the principal case, does not estop a party to a partition suit from subsequently acquiring title from one not a party to such suit and enforcing it against the other parties and their successors in interest: *Avery v. Akins*, 74 Ind. 283; *Kenney v. Phillipy*, 91 Ind. 511; *Richardson v. Cambridge*, 2 Allen, 118, 79 Am. Dec. 767; *Tapley v. McPike*, 50 Mo. 592; *Woodbridge v. Banning*, 14 Ohio St. 330; contra, *Doe ex dem. Short v. Prettyman*, 1 Houst. (Del.) 334; *Venable v. Beauchamp*, 3 Dana, 325, 28 Am. Dec. 84; *Mills v. Witherington*, 2 Dev. & B. 433; *Carter v. White*, 134 N. C. 466, ante, p. 853, 46 S. E. 983. Necessarily this must be true when a party to the action has some inchoate right or interest which cannot, under the rule of practice there prevailing, be asserted in the suit or recognized and provided for in the judgment, as where one of the parties had an in-

choate right of dower which subsequently to the partition became perfect by the death of her husband, and which by the law in force is not destroyed by the judgment. In such a case she remains entitled to dower, which may afterward be assigned, contribution being decreed in favor of the parties who suffer loss by reason of the assignment: *Walker v. Hall*, 15 Ohio St. 385, 86 Am. Dec. 485.

RODMAN v. ROBINSON.

[134 N. C. 503, 47 S. E. 19.]

SPECIFIC PERFORMANCE—Contract to Convey—Dower Rights.—A husband cannot avoid a decree for the specific performance of his contract to convey land to which his wife is not a party, on the ground that she is entitled to dower in the land. (p. 878.)

SUNDAY CONTRACTS—A contract for the conveyance of land entered on Sunday is valid and not opposed to public policy. (p. 884.)

CONTRACTS to Convey Land—Breach of Election of Remedies.—Upon a breach of a contract to convey land, the purchaser may sue for specific performance, and is not bound to bring an action at law for damages. (p. 886.)

SPECIFIC PERFORMANCE—Contract to Convey Land.—If no Fraud or Mistake is alleged, the fact that the vendor made a bad trade does not release him from specific performance of his contract to convey land. (p. 886.)

SPECIFIC PERFORMANCE—Contract to Convey.—Description of the land by metes and bounds is sufficient in a suit for the specific performance of a contract to convey land. (p. 886.)

Connor & Connor and E. K. Bryan, for the plaintiffs.

J. D. Kerr, F. R. Cooper and Shepherd & Shepherd, for the defendant

504 CLARK, C. J. On Sunday, September 14, 1902, the defendant, who then was and still is the owner in fee and in possession of the land described in the complaint, contracted in writing, dated September 13, 1902, with plaintiff Rodman to sell him said land, possession to be given the 1st of January, 1903, and deed to be delivered the 1st of April, 1903, at which time the purchase money was to be paid. In December, 1902, defendant informed Rodman that he would not deliver possession nor accept the purchase money and repudiated the contract, nevertheless Rodman did tender the four thousand two

hundred dollars, the agreed price, in money on the 1st of April, 1903, or as soon thereafter as defendant could be found, and demanded the deed, but defendant refused to accept the money or deliver the deed. The contract is admitted in the answer, and judgment for specific performance was rendered upon the pleadings and defendant appealed.

The first assignment of error is: "Because it appears from the answer that defendant was at the time of signing said alleged contract to convey a married man, and his wife is still living and entitled to dower and homestead right in said land, and the judgment does not sufficiently guard and protect such right." The wife has an inchoate right of dower, but she has no present right to the property nor to its possession, nor any dominion over it, she has only a right therein ⁵⁰⁵ contingent upon surviving her husband, which may not happen: *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318. The Code, section 2103, expressly provides that upon the death of the husband the widow shall be entitled to dower. Besides, this is an objection which the plaintiff alone could make. The wife is not a party to this action and the decree in no wise affects her contingent interest. Having taken the contract without the wife's signature, the plaintiff could not obtain a decree compelling her to join in the deed: *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1; *Fortune v. Watkins*, 94 N. C. 304. The Code, section 2106, recognizes the right of the husband to alien without the joinder of the wife, the conveyance having no effect upon the wife's contingent right of dower: *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Mayho v. Cotten*, 69 N. C. 289. As to the homestead right, it was not necessary for the wife to join in the contract, because the answer admits that no homestead had been allotted in this land: *Mayho v. Cotten*, 69 N. C. 289, approved, *Joyner v. Sugg*, 132 N. C. 589, 44 S. E. 122. Besides, the answer further admits the solvency of the defendant, that there is no judgment docketed against him, and that he owns other lands more than sufficient in value for the allotment of the homestead: *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 436. The conveyance or contract is valid, subject to the contingent right of dower: *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318; *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772. The wife is not a party to this action and not estopped by the judgment if the above admissions should prove untrue. The wife not being a party, the

exception that her "rights are not protected by the decree" has no place here.

The second assignment of error is: "Because the contract to convey was entered into and signed upon Sunday, and no consideration being passed, and the defendant having ⁵⁰⁶ repudiated the contract the week following, said contract is not enforceable and the judgment should have declared said contract to be void." The promise to pay four thousand two hundred dollars purchase money was a sufficient consideration: *Puffer v. Lucas*, 101 N. C. 284, 7 S. E. 734; *Worthy v. Brady*, 91 N. C. 265, 108 N. C. 440, 12 S. E. 1034; *Clark on Contracts*, 149, 169; 9 Cyc. 323. The contract having been accepted by plaintiff the attempted repudiation thereof by the defendant without the consent of the plaintiff has no effect: *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. Rep. 913, 34 L. ed. 447. So this exception hinges upon the question whether the contract is invalid because entered into and signed on Sunday.

This point has been settled in this state by repeated decisions. A contract entered into on Sunday is not invalid at common law: *Clark on Contracts*, 393; *Drury v. De Fontaine*, 1 Taunt. 131 (in which it was held that a vendor could recover the price of a horse sold on Sunday); *Benjamin on Sales*, sec. 552. Our statute (Code, section 3782) is copied almost verbatim from the first part of the statute, 29 Charles II, chapter 17 (1678). The other part forbidding service of process on Sunday is omitted from our statute, which merely provides that "on the Lord's Day, commonly called Sunday, no tradesman, artificer, planter, laborer or other person shall . . . do or exercise any labor, business or work of his ordinary calling, . . . upon pain that every person so offending . . . shall forfeit and pay one dollar." This part was construed by Lord Mansfield in *Drury v. De Fontaine*, 1 Taunt. 131, not to invalidate a sale of a horse on Sunday when the sale was not a part of the vendor's ordinary calling. This statute is the foundation of nearly all the Sunday legislation in this country.

It is not alleged in the answer that this contract was made and entered into by either the plaintiff Rodman or the defendant ⁵⁰⁷ Robinson in pursuance by either of his ordinary calling.

In *Melvin v. Easley*, 52 N. C. 356, the court said: "The statute in its operation is confined to manual, visible or noisy labor, such as is calculated to disturb other people, for ex-

ample, keeping open shop or working at a blacksmith's anvil. The legislature has power to prohibit labor of this kind on Sunday on the ground of public decency. . . . But when it goes further and . . . prohibits labor which is done in private the power is exceeded, and the statute is void." In that case it was held that selling a horse on Sunday was not forbidden by the statute, as dealing in horses was not Melvin's "ordinary calling." Again, it is said in *State v. Ricketts*, 74 N. C. 192: "In this state every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." This has been cited and approved in *White v. Morris*, 107 N. C. 99, 12 S. E. 80 (in which Davis, J., calls attention to the fact that prior to the code civil process could not legally be served on Sunday, but now the restriction applies only to forbid arrests in civil actions on that day), approved also in *State v. Penley*, 107 N. C. 808, 12 S. E. 455; *Ashe, J.*, in *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90, and *State v. Howard*, 82 N. C. 626, *Merimon, C. J.*, in *State v. Moore*, 104 N. C. 749, 10 S. E. 183, *Taylor v. Ervin*, 119 N. C. 276, 25 S. E. 875—all these last holding that it was not illegal to hold court on Sunday if the judge deemed it necessary, though out of considerations of propriety it ought not to be done unless necessary.

In *State v. Brookbanks*, 28 N. C. 73, *Ruffin, C. J.*, held that it was not indictable to sell goods in open shop on Sunday, and in *State v. Williams*, 26 N. C. 400, the court through the same judge held it not indictable to work on Sunday, it not being indictable either at common law (citing ⁵⁰⁸ *Rex v. Brotherton*, 1 Str. 702; *Rex v. Cox*, Burr. 785), or by our statute, adding (page 400): "It is clear that the making of bargains on Sunday was not a crime against the state, for contracts made on that day are binding. It has often been so ruled in this state, and after elaborate argument and time to advise." *Covington v. Threadgill*, 88 N. C. 189, is obiter merely, and *Waters v. Richmond etc. R. R. Co.*, 108 N. C. 349, 12 S. E. 950, is a construction of section 1632 of the General Statutes of South Carolina, which is a part of the statute, 29 Charles II, which has been omitted in our statute.

Counsel for defendant contend that Christianity is a part of the law of the land, and hence, independent of any statute. the contract is invalid. If the observance of Sunday were commanded by statute as an act of religion or worship, such

statute would be absolutely forbidden. The founder of the Christian religion said that his "Kingdom was not of this world," and under our constitutions, both state and federal, no act can be required or forbidden by statute because such act may be in accordance with or against the religious views of anyone. The first amendment to the federal constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," and the constitution of this state, article 1, section 26, reads: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should in any case whatever control or interfere with the right of conscience." If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons the statute could not be maintained. The Seventh Day Baptists and some others, as well as the Hebrews, keep Saturday and the Mahommedans observe Friday. To compel them or anyone else to observe Sunday for religious reasons would be contrary to our fundamental law. The ⁵⁰⁰ only ground upon which "Sunday laws" can be sustained is that in pursuance of the police power the state can, and ought to, require a cessation of labor upon specified days to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection but a convenience. Yet such statute cannot be construed beyond its terms so as to make the signing of a contract on Sunday invalid when the words prohibit only "labor, business or work of one's ordinary calling."

It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England where there is a union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law which expressly denies religion any place in the supervision or control of secular affairs. As a contemporary construction of the federal constitution, it may be well to recall that one of the first treaties of peace made by the United States—that with Trip-

oli—which was sent to the Senate with the signature of George Washington, who had been president of the convention which adopted the United States constitution, began with these words: "As the government of the United States is not in any sense founded on the Christian religion." This treaty was ratified by the Senate. If it was presumption in Uzza to put forth his hand to stay the tottering Ark of God at the threshing floor of Chidon, it is equally forbidden under our severance of church and state for the civil power to enforce cessation of work upon the Lord's Day in maintenance of ⁵¹⁰ any religious views in regard to its proper observance. That must be left to the consciences of men, as they are severally influenced by their religious instruction. Churches differ widely, as is well known, on this subject, the views of the Roman Catholics and Presbyterians, for instance, being divergent, and the views of other churches differing from both.

Even if Christianity could be deemed the basis of our government, its own organic law must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or indeed any day. The Master's references to the Sabbath were not in support but in derogation of the extreme observance of the Mosaic day of rest indulged in by the Pharisees. The Old Testament commanded the observance of the Sabbath, but that was an injunction laid upon the Hebrews, and it designated Saturday, not Sunday, as the day of rest, prescribing a thoroughness of abstention from labor which few observe, even of the people to whom the command was given.

Sunday was first adopted by the Christians in lieu of Saturday long years after Christ, in commemoration of the Resurrection. The first "Sunday law" was enacted in the year 321 after Christ, soon after the Emperor Constantine had adjured paganism, and apparently for no different reason than the Christian observance of the day. It is as follows: "Let all judges and city people and all tradesmen rest upon the venerable day of the Sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence the favorable time should not be allowed to pass lest the provisions of heaven be lost": Codex, Justin, lib. 3, tit. 12, 1, 3. Evidently Constantine was still something of a heathen. As late as the year 409 two rescripts of the Emperors Honorius and Theodosius indicate

that Christians ⁵¹¹ then still generally observed the Sabbath (Saturday not Sunday). The curious may find these set out in full, Codex Just., lib. 1, tit. 9, Cx. 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the Emperor Leo: Leo Cons. 54. The subsequent development of Sunday laws will be found in Lewis' "Sunday Legislation." This legislation has differed in different Christian countries and still differs, and the divergence is very great even in the legislation of the states of this Union.

The Saxon laws under Ine (about A. D. 700) forbade working on Sunday, but under Alfred (A. D. 900) and Athelstane (A. D. 924) the prohibition was merely against marketing on Sunday, and there seems to have been no statute against working on Sunday (whatever the church may have enjoined) until the above-cited statute, 29 Charles II, chapter 7 (1678), the first part of which is almost verbatim our statute, Code, section 3782: See 4 Blackstone's Commentaries, 63. Indeed, it appears from the records of Merton College, Oxford, that at its manor of Ihstone, in the latter part of the thirteenth century, contracts with laborers provided for cessation from work on Saturdays and holidays, but it was stipulated that work should be done in regular course on Sunday: Thorold Rogers' Work and Wages, c. 1. Indeed, it seems that this was usual in England till the time of the commonwealth and the rise of the Puritans to power, but the change was not enacted into law till the above-cited statute of Charles II in 1678.

The first Sunday law in this country was enacted in Virginia in 1617 (three years before the landing at Plymouth), and punished a failure to attend church on Sunday with a fine payable in tobacco. This was re-enacted in 1623: Henning's Statutes at Large, Va., 1619-60, vol. 1, p. 123. Plymouth colony (Records, volume 11, p. 214) made it punishable ⁵¹² by imprisonment in the stocks to go to sleep in church, and on June 10, 1650, the same colony made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's Day. "So any sin committed with an high hand, as the gathering of sticks on the Sabbath day, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need": Records of Massachusetts Bay, vol. 2, p. 93. Publicity did not then have the virtue attributed to it as now, but the reverse. Hutchinson's History of Massachusetts, volume 1.

page 390, says: "Divers other offenses were made capital, viz. profaning the Lord's Day in a careless or scornful neglect or contempt thereof: Numbers xv: 30-36." The New Haven Colony Records of 1653-55, page 605, contain a similar provision that profaning the Lord's Day by "sinful servile word or unlawful sport, recreation or otherwise, whether willfully or in a careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of such sin and offense"; providing further, that if "the sin was proudly, presumptuously and with a high hand committed" such person "shall be put to death." On May 19, 1668, after the union of New Haven and Connecticut in one colony, unnecessary travel or playing on Sunday, or keeping out of the meeting-house, was made punishable by imprisonment in the stocks adding "and the constables in the several plantations are hereby required to make search for all offenders against this law and make return thereof": Colonial Records of Connecticut 1665-67, p. 88. Similar laws but of less severity, were enacted in some other provinces. While the statutes of the several states still differ on the subject of Sunday legislation, all of these enactments are now based upon the police power, that some rest may be guaranteed to the workers and to avoid offense by the noise and tumult of traffic and labor to ⁵¹⁸ the great majority who desire a day of quiet and peace for their devotional services: Bishop on Contracts, sec. 536, says: "It is abundantly settled that a Sunday contract is good when it does not come in conflict with any statute." We do not deny the constitutionality of a Sunday law based on the police power, which is well settled: *Judefind v. State*, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721, and notes. We hold that our statute does not make void the contract here sued on. In the language of Caldwell, J., in *Swan v. Swan*, 21 Fed. 305: "It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day." And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday.

Among the authorities elsewhere which hold in accordance with our decisions that a note or contract made on Sunday is valid, are *Barrett v. Aplington*, Fed. Cas. No. 1045; *More v. Clymer*, 12 Mo. App. 11; *Glover v. Cheatham*, 19 Mo. App. 656;

Sanders v. Johnson, 29 Ga. 526; Dorough v. Equitable Mtg. Co., 118 Ga. 178, 45 S. E. 22; Ray v. Cattel, 51 Ky. 532; Hazzard v. Day, 14 Allen (Mass.), 487, 92 Am. Dec. 790; Geer v. Putnam, 10 Mass. 312; Kaufmann v. Hamm, 30 Mo. 388 (which held valid a promissory note made on Sunday); Foster v. Wooten, 67 Miss. 540, 7 South. 501; Horacek v. Keebler, 5 Neb. 355; Fitzgerald v. Andrews, 15 Neb. 52, 17 N. W. 370; Switcher v. Williams, Wright (Ohio), 754; Bloom v. Richards, 2 Ohio St. 387; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684 (which holds a mortgage executed on Sunday to be valid); Mills v. Williams, 16 S. C. 593; Lucas v. Larkins, 85 Tenn. 355, 3 S. W. 647 (privy examination on Sunday valid); Gibbs etc. Mfg. Co. v. Brucker, 111 U. S. 597, 4 Sup. Ct. Rep. 572, 28 L. ed. 534; Allen v. Gardner, 7 R. I. 22; Moore v. Murdock, 26 Cal. 514; Johnson v. Brown, ⁵¹⁴ 13 Kan. 529; Birks v. French, 21 Kan. 238; Boynton v. Page, 13 Wend. 425; Miller v. Roessler, 4 E. D. Smith, 234; Balsord v. Every, 44 Barb. 618; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Eberle v. Mehebach, 55 N. Y. 682; Amis v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; Behan v. Ghio, 75 Tex. 87, 12 S. W. 996; Schneider v. Sansom, 62 Tex. 201, 50 Am. Rep. 521; Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445; Main v. Johnson, 7 Wash. 321, 35 Pac. 67; Raines v. Watson, 2 W. Va. 371; Clark on Contracts, 395, and there are others to same purport. There are decisions to the contrary, but they will be found almost entirely in states where the statute, unlike ours, is not restricted to "labor, business or work done in one's ordinary calling," but is extended in its terms so as to embrace the prohibition of contracts of all kinds on Sunday. In such cases, as is said in Swan v. Swan, 21 Fed. 299, "contracts made on the Lord's Day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute." The execution of a will on Sunday seems to be held valid everywhere. The Pennsylvania court in 1850 was evenly divided on the question whether "a marriage contract executed on Sunday was such worldly employment or business as was forbidden on that day": In re Gongwore's Estate, 14 Pa. 417, 53 Am. Dec. 554; but better advised later, in 1882 they held that a contract of marriage entered into on Sunday was valid: Markley v. Kessering, 2 Pennyp. 187.

To sum up the whole matter, the validity, in the courts, of any act done on Sunday depends not upon religious views but upon the statute of each particular state, and our statute only forbidding "labor, work or business of one's ordinary calling" does not invalidate a contract, as here, which was ⁵¹⁵ not an act done as a part of the plaintiff's usual business or calling: Bishop on Contracts, sec. 538, and cases cited. As was said in *State v. Ricketts*, 74 N. C. 172: "What religion and morality permit or forbid to be done on Sunday is not within our province to decide."

The third exception is that the agreement to convey was void because without consideration and against public policy. Both these points have been disposed of: See, also, *Dowdy v. White*, 128 N. C. 17, 38 S. E. 129, as to mutual promises being sufficient consideration, and on public policy, see note at end of opinion in *Swan v. Swan*, 21 Fed. 308.

The fourth and last exception is that the decree is "for specific performance, while the plaintiff at most is entitled only to damages for breach of contract." In *Bryson v. Teak*, 43 N. C. 310, it is held: "In case of breach of contract of sale, the injured party is entitled at his election to a bill for specific performance, and is not bound to bring an action at law for damages." To same purport: *Springs v. Sanders*, 62 N. C. 67; *Young v. Griffith*, 84 N. C. 715; *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16; *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Hennessy v. Wolworth*, 128 U. S. 138, 9 Sup. Ct. Rep. 109, 32 L. ed. 500.

The allegation that the defendant made a bad trade, there being no fraud or mistake alleged, does not exempt him from specific performance: *Stamper v. Stamper* 121 N. C. 251, 28 S. E. 20; *Whitted v. Fuquay*, 127 N. C. 68, 37 S. E. 141; *Moore v. Reed*, 37 N. C. 580. If, as the defendant admits, he is liable to damages for the difference between the contract price and the value of the land, then he is not hurt because he would have to pay the difference, and there would be no reason for a refusal to decree specific performance.

There is no fraud or mistake as alleged. The land is described by metes and bounds, and that is sufficient: *Laws 1891*, c. 465; *Carson v. Ray*, 52 N. C. 609, 78 Am. ⁵¹⁶ Dec. 267; *Fortescue v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Farthing v. Rochelle*, 131 N. C. 563, 43 S. E. 1.

The decree should have directed the defendant to make reasonable effort to get his wife to sign the deed: *Swepson v. Johnston*, 84 N. C. 449; *Welborn v. Sechrist*, 88 N. C. 292; but that was error against the plaintiffs, who are not appealing.

No error.

Walker, J., concurs in result.

Connor, J., having been of counsel, did not sit on the hearing of this case.

Contracts Made on Sunday in matters of business, other than such as are prohibited by statute, are valid. A deed of trust executed on Sunday is not void under a statute simply prohibiting work and labor on that day: *Roberts v. Barnes*, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640, and see the cases cited in cross-reference note thereto. For other authorities on the validity of Sunday contracts, see *Acme Elec. etc. Co. v. Van Derbeck*, 127 Mich. 341, 89 Am. St. Rep. 476, 86 N. W. 786; *Cook v. Forker*, 193 Pa. St. 461, 74 Am. St. Rep. 699, 44 Atl. 560; *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407, 47 N. E. 420; monographic note to *Henry Christian etc. Assn. v. Walton*, 59 Am. St. Rep. 641-644.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HUMPHREYS v. STATE.

[70 Ohio St. 67, 70 N. E. 957.]

APPELLATE PRACTICE—State as Appellant—Appeal Bond. If the probate court, in the settlement of a decedent's estate, decides the liability of a devise, legacy, bequest or inheritance to pay a collateral inheritance tax as provided by statute, an appeal may be taken from such judgment as authorized by statute, and if the state takes such appeal, it may be done without giving an appeal bond or filing a written notice of intention to appeal. (pp. 889, 890.)

INHERITANCE TAXES—Liability of Foreign Corporations for.—Charitable societies and auxiliaries thereto, incorporated and organized under the laws of other states are not within the provisions of an inheritance tax statute which exempts from the payment of such tax, gifts, bequests, devises, etc., "to or for the use of any institution in said state for purposes of purely public charity, or other exclusively public purposes," and if such foreign corporations are entitled to receive property within the state of such statute, by gift, bequest or devise, they are liable to such inheritance tax, although some of their charitable work and enterprises are carried on within the state. (p. 894.)

CONSTITUTIONAL LAW—Inheritance Tax—Foreign Corporations.—A statute of a state imposing an inheritance tax upon foreign charitable corporations operating to some extent within the state as to property received by them therein by gift, bequest, or devise, is not unconstitutional as an unlawful discrimination against them or as denying them the equal protection of the law. (p. 898.)

L. Maxwell, Jr., J. E. Humphreys and J. S. Graydon, for the plaintiffs in error.

Hoffheimer, Morris & Sawyer, for the defendants in error.

72 PRICE, J. It is said in the opening of the brief for plaintiffs in error, that this proceeding involves two questions of law: "1. Whether the appeal from the probate court to the court

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of common pleas was duly taken; 2. Whether the legacies are taxable."

1. The right to appeal in cases like the present is conferred by section 2731-13 of the Revised Statutes, which is: "The court of probate, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise, affecting any devise, legacy or inheritance under this act, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in any such proceedings."

It is claimed for plaintiffs in error that the words "subject to appeal as in other cases" mean that the remedy of appeal must be exercised according to the general rule provided for appeal from the probate to the court of common pleas, which is found in section 6408 of the Revised Statutes. That section provides, in substance, that the person desiring to take an appeal, shall, within twenty days after the making of the order, decision or decree from which he desires to appeal, give a written undertaking to the ⁷³ adverse party, with one or more sufficient sureties, to be approved by the probate judge, and conditioned, etc. But when the person appealing is a party in a fiduciary capacity in which he has given bond within this state, and he appeals in the interest of the trust, he shall not be required to give bond but shall be allowed the appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond.

It is conceded in this case that no bond was given, by either the state or by the prosecuting attorney in behalf of the state; and it is manifest on the record that the only notice of appeal was given by journal entry as follows: "The prosecuting attorney gives notice of appeal from so much of said order as finds that an inheritance tax is not payable upon the legacies to the following legatees, viz.: American Bible Society" et al., naming each of the other religious societies and boards, receiving legacies.

But is the mode of appeal governed by section 6408 of the Revised Statutes? In such a proceeding before the probate court, it cannot be correctly stated that either the state or the prosecuting attorney acts in a fiduciary capacity. On the contrary, the state is a sovereign and such is its relation to the controversy. It is provided in section 213 of the Revised Statutes: "No undertaking or security is required on behalf of the

state or of any officer thereof in the prosecution or defense of any action, writ, or proceeding; nor is it necessary to verify the pleadings on the part of the state or any officer thereof in any such action, writ, or proceeding."

It is under this section that the state or its officer is relieved from giving bond for an appeal, and not ⁷⁴ under section 6408, supra. And the state or the prosecuting attorney, not sustaining a fiduciary relation to the proceeding, the notice of appeal in behalf of the state need not be in writing as provided in the latter section; for it is only where that relation exists, that such written notice is required under its provisions.

We are of opinion that section 6411 of the same chapter and title furnishes the guide in this case. "That provisions of law governing civil proceedings in the court of common pleas shall, so far as applicable, govern like proceedings in the probate court, when there is no provision on the subject in this title."

We have seen that the other provisions of the title do not apply to this class of proceedings. We therefore look to the manner of appeal from the court of common pleas as found in section 5227 of the Revised Statutes, which is: "A party desiring to appeal his cause to the circuit court shall, within three days after the judgment or order is entered, enter on the records notice of such intention." This was the law at the time of the appeal in this case.

Notice of intention to appeal was entered on the records of the probate court in conformity with the above rule, and we think it is sufficient. The appeal was properly sustained.

2. Whether the legacies are subject to the collateral inheritance tax, depends on the construction of section 2731-1 of the Revised Statutes. The statute in its present form was enacted April 6, 1900: See 94 Ohio Laws, 101. This act provides in part: "That all property within the jurisdiction of this state, and any interests ⁷⁵ therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child . . . or the lineal descendants of any adopted child, the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of five per centum of its value, above the sum of two hundred dol-

lars, seventy-five per centum of such tax to be for the use of the state, and twenty-five per centum for the use of the county wherein the same is collected. . . .

"But the provisions of this act shall not apply to property or interests in property transmitted to the state of Ohio under the intestate laws of this state, or embraced in any bequest, devise, transfer or conveyance to or for the use of the state of Ohio, or to or for the use of any municipal corporation or other political subdivision of said state for exclusively public purposes, or public institutions of learning, or to or for the use of any institution in said state for purposes of purely public charity, or other exclusively public purposes; and the property or interests in property, so transmitted or embraced in any such devise, bequest, transfer or conveyance is hereby declared to be exempt from all inheritance and other taxes, while used exclusively for any of said purposes."

The words in the exemption clause, "to or for the use of any institution in said state for purposes of ⁷⁸ purely public charity or other exclusively public purposes," are the subject of the present controversy.

The first lines of the act are comprehensive and would embrace the legacies named and subject them to the inheritance tax, unless they are saved by the above exemption clause. Therefore counsel have discussed, and we are called upon to consider, the scope of the language quoted when applied to the facts of the present case. What are the material facts?

It is shown by the record that all the legatee societies and boards who are plaintiffs in error, save the Woman's Home Missionary Society, are incorporated in states other than Ohio, and while they are not organizations for profit, but for the purpose of advancing the cause of religion and dispensing charity, they are, nevertheless, foreign corporations. Some were chartered under the laws of New York, and others under the laws of Pennsylvania.

The Woman's Home Missionary is an auxiliary to the Board of Home Missions, and the Woman's Foreign Missionary Society is auxiliary to the Board of Foreign Missions. The parent of all these societies and boards seems to be the General Assembly of the Presbyterian Church in America, incorporated in another state, which is the central and supreme authority, and where the subordinate societies and boards became incor-

porated, it was done under the direction of the General Assembly.

The American Tract Society has colporteurs in almost if not all the states of the Union, and other agencies for the distribution of religious literature. The aim of the American Bible Society is the distribution of the Holy Scriptures, translated into numerous languages, among the people generally,⁷⁷ and especially among the destitute and needy classes. While foreign corporations, or auxiliaries thereto, it is true that the work laid out for each board and society is carried on in all the states through local and subordinate agencies, and it may be admitted that theirs are works of charity in the broad sense, that the uplifting of men, women and children to the standard of life taught in the Scriptures is, indeed, a work of charity, the greatest of the three Christian graces. The funds to carry forward these religious enterprises, under the various names and organizations, are raised by church and other collections and largely aided by devises and legacies.

The testatrix, Isabella Brown, no doubt was a devout member of the Presbyterian church, and of her bounty she liberally gave to these several societies and boards, believing they could best employ her gifts in advancing the cause of the church of her choice.

The work of the Board of Missions for Freedmen lies mostly in our southern states. But it must be stated as a fact appearing in the record, that while legatees, who are plaintiffs in error, through auxiliary and subordinate agencies, are diligent in every state of the Union, the higher authority to which they must account resides beyond the jurisdiction of this state, and hence the question recurs, Are they "institutions in this state for purposes of purely public charity, or other exclusively public purposes"?

We are urged to conclude that because the work of these societies and boards is in progress, in greater or less degree, and their influence felt in this state through the various subordinate agencies employed, the institutions themselves are in this state within the meaning of the statute. If this is true of Ohio,⁷⁸ it is true of every other state, and we have these institutions, not only in the state where they are chartered, but omnipresent and in all the states. In other words, they would, as institutions exist in any state where any of their charitable or religious enterprises are projected and carried on, no matter in what de-

gree. Such a construction of the facts and the law, we think, is not permissible, if the statute is valid, of which we shall speak later in this opinion.

It seems to be true that some of these societies and boards have an office in Ohio in charge of a representative, the better to conduct the affairs of that church agency. So, also, have railway, insurance, telegraph, telephone, and other foreign corporations; but that is to further their business enterprises. Such companies are not "institutions in this state," because they have traffic and conduct business here. They are still corporations and institutions of the state where chartered and organized.

Learned counsel for plaintiff in error ask in their brief, "Where are these institutions if not in Ohio? Where were the institutions before charters were granted? For they were in existence long prior to the dates of the charters."

It is perhaps true that these institutions now operating under charters may have had another form of existence prior to the date of the charters, but in the wisdom of the General Assembly of the church it was decided to organize them under charters, and it selected the state under whose laws it should be done. It is not a new proposition that the home of the corporation is the state of its incorporation, and when so incorporated under the laws of a state selected for that purpose it has also selected its abiding place, and no longer can be recognized as ⁷⁹homeless, or as abiding in every state where they have agencies carrying forward their work of benevolence and charity. We think this view is abundantly supported by the authorities.

The will of Mrs. Brown, who was a resident of Cincinnati, gave no directions to her executor or her legatees as to the place where the money should be expended, nor does it undertake to control the time or place of the expenditure. Once in the possession of these institutions, it may be disbursed as they deem proper, and all of it may be disbursed in communities beyond our borders. So we do not find that we are adopting a narrow construction of our statute if it appears that it undertakes to tax the right of the foreign, though charitable, institutions to receive and so absolutely control the disposition of property owned by the testatrix in this state. We think these legatees are not "institutions in this state" within the meaning of the statute.

The doctrine we maintain is happily expressed by Justice Field in *Paul v. Virginia*, 8 Wall. 181, 19 L. ed. 357, as follows: "Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274: 'It must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence, even in other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended ⁸⁰ where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. . . . They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with its citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Again, in speaking of the assent of the other states to transact business within their borders, the learned justice adds, "that such assent may be granted upon such terms and conditions as those states may think proper to impose."

We have from this high authority a definition of the situs of corporations and their relation to states other than where chartered; and we find no distinction in this respect between business corporations and those not for profit, or for religious or charitable purposes. Quotation from other authorities we think superfluous and it seems clear that these charitable and religious institutions, being corporations foreign to the state, are not "institutions in this state," and are, therefore, not within the exemption provided in the inheritance statutes.

Applying the doctrine in a practical manner, we have numerous decisions, many of which are cited in the brief for defendants in error. We will occupy space in citing and discussing but few of them, and only such as may serve as fairly representative of the many others.

In *People v. Seaman's Friend Soc.*, 87 Ill. 246, it appears that the society was incorporated under the laws of Ohio. It had a building in Chicago ⁸¹ in charge of a superintendent, where

seamen, dockmen, were solicited to meet for religious and moral instruction, and lodging was provided for needy cases. The object of the society, as declared in the act of incorporation, is "for disseminating moral and religious instruction, and other charities, among sailors and laborers doing business on our western waters." This institution resisted the collection of a tax on the Chicago premises, on the ground that, being a place where charity is dispensed, it was exempt. The court, on page 249, say: "But if a broader construction could be given to the statute, and it could be held to embrace all institutions that dispense charity, whether public or private, and the property used exclusively for that purpose, there is still a valid reason why the property in this case is not exempt from its just proportion of taxation. The statute must, in any event, be understood to have exclusive reference to institutions or corporations created by the laws of this state, and not to foreign corporations that may choose to locate branches in this state. It is only by the comity that exists between states that foreign corporations are permitted to transact in this state the business for which they were created. The General Assembly has manifested no intention to relieve the property situated in this state, belonging to such corporations, no matter what their objects may be, whether charitable or otherwise, from the burdens of taxation."

We further illustrate the application of the statute by reference to another leading case, decided by the court of appeals of New York: *Matter of Estate of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713. Prime, a resident of that state, died in the city of New York on April 7, 1891, leaving a will disposing ⁸² of real and personal property. He gave legacies to collateral relatives and also to two foreign corporations—the American Board of Commissioners for Foreign Missions and the Presbyterian Board of Relief for Disabled Ministers. The taxing authorities exacted a collateral inheritance tax on the legacies to those corporations, as well as on the legacies to the collateral heirs. These legatees appealed, and the controversy finally reached the court of appeals. Other questions were in the case, as to the condition of the statutes of that state upon the subject, which are not relevant here and they are omitted. We quote from the able opinion of Andrews, C. J., as follows: "The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the

same character to the payment of such tax, and that if one is exempt, the other is exempt also, has, we think, no foundation. In both cases the question is the same—Has the statute made the legacy taxable? The argument that gifts for the promotion of charity, education and religion should be encouraged and should not be diminished by exactions of the state, presents a moral and political rather than a judicial question. It is the duty of courts in the interpretation of statutes, to declare the law as it is, and the interests of society are best subserved by a close adherence by courts to what they find to be their plain meaning, neither narrowing the application on one hand, nor extending the meaning on the other, to meet a case not specified, which may be within the reason of the law. . . . It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside its own ⁸³ limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large." The opinion from which the above was quoted was unanimous.

The same court had before it another inheritance tax case, which is found in *Matter of Balleis*, 144 N. Y. 132, 38 N. E. 1007, where the Prime case was considered and its principles unanimously approved. It was held that "a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control."

The Prime case was considered as a valuable authority in *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. Rep. 1073, 41 L. ed. 287, and it is quoted from, as we have done, with approval, and adds, as found on page 629 of 163 U. S.: "Such a tax (inheritance tax) was also held by this court to be free from any constitutional objection in *Mager v. Grima*, 8 How. 490-493, 12 L. ed. 1168, Mr. Justice Taney remarking that 'the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . If a state may deny

the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.' We think ⁸⁴ that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States (a legatee of personal property), since the tax imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and is only upon this condition that the legislature assents to a bequest of it."

The same doctrine is found in *Eidman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. Rep. 515, 46 L. ed. 697; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403, 36 L. ed. 164.

From the foregoing cases we see that the exemptions of charitable institutions would relate only to domestic institutions of that class, even if the words "in the state" had been omitted from the statute. It is not a tax upon property, but upon the right to receive property and have it transferred. Our statute does not impose the tax upon the property directly, because it provides that "all administrators, executors and trustees . . . shall be liable for all such taxes, with lawful interest, as hereinafter provided."

However, it is argued that our construction of the statute place it in conflict with section 2 of our Bill of Rights; and also in conflict with the fourteenth amendment to the constitution of the United States. We will consider these guaranties together. That part of section 2 of our Bill of Rights which is germane to the argument is: "And no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly." That portion of the so-called fourteenth amendment to the constitution of the United States which is pertinent now is: ⁸⁵ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person the equal protection of the laws."

Very much that we have already said and quoted bears upon the interposition of these provisions, and we still fail to see how the statute under consideration discriminates against the institutions complaining here. Section 2 of the Bill of Rights interdicts the conferring special privileges and immunities be-

yond the power of the general assembly to alter, revoke or repeal. There is nothing occult or mysterious about this language in our declaration of fundamental principles.

Our constitution was adopted by the people of Ohio as their charter of rights and restraints, and it is not charged with the care of nonresident persons or corporations; and the statute in question creates no privileges or immunities in favor of charitable institutions within the state, which the general assembly may not alter, revoke or repeal; and surely it is competent for it to exempt the property of institutions, corporations, which it has created, which property is devoted to purely religious or charitable purposes. There are no Ohio institutions here complaining of any discrimination against them. Nor do we see any help for plaintiff in error in the fourteenth amendment to our federal constitution. The statute we are considering does not abridge the privileges or immunities of citizens of other states, nor does it deny to any person the equal protection of the laws.

Within the meaning of this clause a foreign corporation is not a citizen and cannot invoke its protection. ⁸⁶ By judicial construction of the constitution of the United States and the federal judiciary act, a corporation is a citizen for the purposes of federal jurisdiction of the state by which its charter has been granted, and this without reference to the residence of the members or shareholders who compose the corporation. When a corporation chartered by or created under the laws of a foreign state is sued in a state court, it may remove the cause to the circuit court of the United States in like manner as a nonresident citizen may, without regard to residence of its members or shareholders. But it is a settled principle of constitutional law that a corporation is not a citizen within the meaning of that clause of the constitution of the United States which declares that "the citizen of each state shall be entitled to all the privileges and immunities of citizens of the several states": 10 Cyc. 150; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Tatem v. Wright*, 23 N. J. L. 429; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

In *Pembina Consolidated Silver Min. etc. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650, the supreme court of the United States says in the syllabus: "Corporations are not citizens within the meaning of the clause of the constitution declaring that the citizens of each state shall

be entitled to all privileges and immunities of citizens in the several states: Const., art. 4, sec. 2, cl. 1. A private corporation is included under the designation of 'person' in the fourteenth amendment to the constitution, section 1. The provisions in the fourteenth amendment to the constitution, section 1, 'that no state shall deny to any person within its jurisdiction the equal protection of the laws,' do not prohibit a state from requiring⁸⁷ for the admission within its limits of a corporation of another state such conditions as it chooses."

This doctrine was fully reviewed and indorsed in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403, 36 L. ed. 164.

It seems unnecessary to cite other decisions by state courts, since the highest tribunal in the land has thus expounded these constitutional provisions.

There is another reason why the alleged discriminations against nonresident institutions is without foundation. The legislature has the right, in laying taxes, to classify corporations, as has been done in this state in recent years and which has been upheld by this court as within the constitutional power of the general assembly. Railroad companies are reached by one mode of appraisal and assessment for taxes; telegraph, telephone, and express companies by other methods; and more private corporations by still another mode. No discriminations can be tolerated in favor of or against one of the corporations of the same class; but there is no valid objection in the fact that one class is required to share in the common burden of taxation in a different way and even in a different degree, from those in other classes: *Lee v. Sturges*, 46 Ohio St. 153, 19 N. E. 560; *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. 1046.

If resident corporations, the creatures of our own laws, cannot justly complain of such classification, how can foreign corporations be heard to find fault when they may be subjected to any reasonable condition for their admission to operate in this state, and⁸⁸ even may be excluded altogether, unless engaged in interstate commerce?

The judgment of the lower court is sound, and it is affirmed.

Spear, C. J., Davis, Shauck, Crew and Summers, JJ., concur.

On the Taxation of Property Held for Charitable purposes, generally, see St. Louis v. Wenneker, 145 Mo. 230, 68 Am. St. Rep. 561, 47 S. W. 105. As to what property is exempt from taxation as a "charitable institution" or a "public charity," see *Philadelphia v. Masonic*

Home, 160 Pa. St. 572, 40 Am. St. Rep. 736, 28 Atl. 954, 23 L. R. A. 545; *Hibernian Ben. Soc. v. Kelly*, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3, 30 L. R. A. 167; *County of Henepin v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298, and note.

Corporations, either foreign or domestic, are not entitled to the privileges of citizens in a constitutional sense, save in the matter of jurisdiction to enable them to appear in the courts: *State v. Hammond*, 110 La. 180, 34 South. 368, 98 Am. St. Rep. 459, and cases cited in the cross-reference note thereto. A state has a right to classify foreign corporations doing business within it in a separate class, and tax them more and on a different basis from domestic corporations: *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459, 34 South. 368. See, too, *Northwestern Mut. Life Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572, and cases cited in the cross-reference note thereto.

GIBBONS v. EBDING.

[70 Ohio St. 298, 71 N. E. 20.]

EASEMENT—Ways Created by Deed—Enforcement.—A reservation in a deed of a specific part of granted premises to be used as a driveway in common by the grantees, and adjoining owners of land, creates an easement in the property granted appurtenant to the adjoining land of the grantor, and binding on that conveyed to the grantee, which passes with the land to all subsequent grantees, and which may be protected or enforced at law or in equity. (p. 901.)

EASEMENTS—Ways—Right to Close with Gates or Bars.—If a right of way is created by reservation in a deed, the grantee acquires the property subject only to such right and may use the land for all purposes not inconsistent with it, and in the absence of anything in the deed or in the circumstances under which the way was acquired or used, showing that it was to be open, the grantee may put gates or bars across it, unless they would unreasonably interfere with its use. (p. 902.)

Goulder, Holding & Masten, for the plaintiffs in error.

Kerruish, Chapman & Kerruish, for the defendants in error.

305 SUMMERS, J. What right or easement, if any, in the twelve feet driveway the owners of the lots conveyed to Southern had prior to his conveyance to the plaintiffs in error, it is not necessary to determine. From his deed to the plaintiffs in error it is apparent that Southern intended therein to create or reserve a right to himself and to the owners of lots on Willson avenue a twelve feet strip for a driveway to use in common with the grantees, and so was created an easement in the land

granted appurtenant to the land for the benefit of which it was created and then owned by him.

In *Whitney v. Union Ry. Co.*, 11 Gray, 359, 363, 71 Am. Dec. 715, Bigelow, J., says: "Every owner of real property has the right to so deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the ³⁰⁶ deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity."

And in *Coudert v. Sayre*, 46 N. J. Eq. 386, 395, 19 Atl. 190, Van Fleet, vice-chancellor, states the following as his conclusions from an examination of a number of authorities: "The doctrine now in force on this subject I understand to be this: That when it appears by the true construction of the terms of a grant that it was the well-understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees. And any grantee of the land to which such right is appurtenant acquires, by his grant, a right to have the servitude or easement, or right of amenity, as it is sometimes called, protected in equity, notwithstanding that his right may not rest on a covenant which, as a matter of law, runs with the title to his land, and notwithstanding that it may also be true that he may not be able to maintain an action at law for the vindication of his right."

It follows that the circuit court was right in concluding ³⁰⁷ that the plaintiff below, by her deed, acquired an easement

to the driveway over the twelve-foot strip, and that she was entitled to an injunction protecting her in the right to use it, but upon what ground the plaintiffs in error were enjoined from inclosing it by a gate is not apparent.

There is nothing in the language of the reservation of the right to use the twelve feet as a driveway that indicates that it was to be either open or public. On the contrary, it is reserved to be used in common by the owners of property on Willson avenue adjoining the driveway, and by the grantees. The property of plaintiffs in error is not bounded on the east by a public way or street, but by a beer garden, it is said, and the court expressly finds that the driveway is also used by trespassers who commit nuisances therein, and that the rental value of plaintiff's property is reduced thereby.

"Where a right of way is created by reservation, the grantee acquires the property subject only to this right, and may use the land for all purposes not inconsistent with it. 'The only limitations upon the right of the grantee are such as are necessary to the proper use of the right of way; nothing which is not expressly reserved will be regarded as an incident to the reservation except that which is necessary for such reasonable enjoyment and use.' Accordingly it was held that the erection of gates or bars at the termini of the way was not an unreasonable interference with its use."

"The rule is general that the land owner may put gates and bars across a way over his land, which another is entitled to enjoy, unless, of course, there is something in the instrument creating the way, or ³⁰⁸ in the circumstances under which it has been acquired or used, which shows that the way is to be an open one. The easement of way is for passage only. The land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the easement": Jones on Easements, secs. 407, 413; Washburn on Easements, 255; Methodist Prot. Church v. Laws, 4 Ohio Cir. Dec. 562, 7 Ohio C. C. Rep. 211.

The decree of the circuit court is modified to the extent that it allowed an injunction against the erection and maintenance of a gate, and as so modified, is affirmed.

Spear, C. J., Davis, Shauck, Price and Crew, JJ., concur.

If a Right of Way is Reserved, but not specifically defined, the way need only be such as is reasonably necessary and convenient for the purpose for which it was granted: Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974. The owner of land which is

subject to a right of way has the right to use his land in any way not inconsistent with the easement: *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800, 23 N. E. 442, 7 L. R. A. 226; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974. See, also, *Lott v. Payne*, 82 Miss. 218, 100 Am. St. Rep. 632, 33 South. 948. That covenants creating easements may run with the land, see the monographic note to *Geisler v. De Graaf*, 82 Am. St. Rep. 674. The rights and obligations of parties to private ways is the subject of a monographic note to *Dudgeon v. Bronson*, 95 Am. St. Rep. 818-330.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

STONE v. MARSHALL OIL COMPANY.

[208 Pa. St. 85, 57 Atl. 183.]

CONFUSION OF GOODS is the Willful and Fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of the latter, in such a way that they cannot be separated and distinguished. (p. 908.)

CONFUSION OF GOODS—Doctrine and Effect.—Although such a term as "confusion of goods" is generally used, there is in fact, properly, no such doctrine as a "confusion of goods." There is a fact of confusion of goods, which if committed with a fraudulent motive, subjects the transaction to an inflexible rule, that the wrongdoer shall not profit by, nor the innocent person suffer from, the wrong. (p. 911.)

CONFUSION OF GOODS.—If a Natural Gas Company fraudulently commingles gas from leased property with gas from other properties under its control, keeping no account thereof, it is bound to account to the owner of the leasehold, who is entitled to one-fourth of the profits therefrom, for one-fourth of the profits from the whole gas confused. (p. 912.)

A. L. Weil, J. W. Lee, John Chapman, R. B. Stone and Charles M. Thorp, for the appellants.

Johns McCleave and R. W. Cummins, for the appellee.

⁸⁰ DEAN, J. Akin, one of the plaintiffs, on November 13, 1885, leased from Grimes the oil and gas under the latter's one hundred and fifty acre farm in Washington county, for the term of three years or as long as oil and gas should be found in paying quantities. Akin as a consideration was to give one-eighth the oil if oil were found, and in case gas was struck in paying quantities, was to pay Grimes \$700 annually for each

well. One well was to be completed within a year, and Akin was to pay \$150 annually in quarterly payments until a well was completed; the lease was acknowledged and recorded July 22, 1886. On December 2, 1886, Akin assigned one-half his lease to C. W. Stone, R. B. Stone and A. J. Hazeltine, the other three plaintiffs to this suit; this assignment was recorded the same day. They drilled no well, but made the quarterly payments to Grimes who accepted them. On August 19, 1887, they executed a lease of fifty acres of the farm to the Marshall Oil Company, subject to all the stipulations of the original lease from Grimes to Akin, all of which stipulations were to be kept and performed by the oil company. The oil company was to have the right to drill and operate for oil and gas for one year and as much longer as oil and gas should be found in paying quantities; the company was to drill four wells, to be completed within four, eight, twelve and sixteen months respectively. ²⁰ Part of the consideration is embodied in this provision: "The said party of the second part (the oil company) for itself, its successors and assigns agrees to give to said parties of the first part (Akin, Stones & Hazeltine), one-fourth of all petroleum, one-eighth to credit of John Grimes and one-eighth to the lessors of this lease. It is also agreed that in case gas shall be discovered and conducted off the premises for use or sale, the said parties of the first part in the proportionate interests aforesaid shall receive one-fourth of the profits thereof above cost bonus of \$700 to the original lessor." This lease is dated August 19, 1887, and was recorded the next day. On December 25, 1887, this lease was supplemented by another of thirty acres more of the farm on the same terms, but providing that of the four wells, none of which had yet been drilled, two should be completed within four months, one on the fifty-acre tract and one on the thirty acre tract, and that as to all oil or gas produced on either tract the royalty should be the same as that fixed for the fifty acres. The Marshall Oil Company then drilled one well, a very strong gas-well; the Marshall Oil Company did not utilize it itself, but sold it to the Washington Oil Company, another of defendants. Then, on June 19, 1888, the Marshall Oil Company induced Grimes to lease to it directly the whole farm for oil and gas purposes. The terms of the lease were substantially the same as those in the lease from Grimes to Akin except, that instead of \$700 per annum, the price for each gas-well was to be \$600, but the price for

the well completed was to remain \$700. Then by a separate agreement Grimes reduced the price per well to \$500. Then by agreement dated July 5, 1888, the Marshall Oil Company leased an additional fifteen acres to the Washington Oil Company subject to the same terms as its first lease to the same company dated the previous June. The Washington Oil Company tubed the first well, piped the gas and sold it from August, 1888, to September, 1889, then by bill of sale transferred the gas to the Taylorstown Natural Gas Company which has been disposing of it ever since. This last company was, practically, a selling company for the Washington Oil Company. The first well was a remarkably strong and productive well; even after nine years there is no perceptible diminution in the pressure or in the volume of gas.

⁹¹ After its contract with Grimes of June 19, 1888, the Marshall Oil Company and Washington Oil Company drilled other wells on the Grimes farm and the gas from them, as well as from the first well drilled, was conducted into a main pipe and from that pipe conducted and distributed to consumers who desired to purchase it. The defendants refused to account to plaintiffs for their share of the profits of the Grimes well and this bill was filed in July, 1893, for discovery and for an account and decree of their share of the profits of that well.

Defendants set up defense that the lease from Grimes to Akin and from the latter to the Stones and Hazeltine were not the subject of assignment; that the covenant for share of the profits was a mere personal covenant of the Marshall Oil Company and not binding on its assignees; that there had been default in payment to Grimes which avoided the lease, and that plaintiffs had an adequate remedy at law.

The late Judge White, then sitting as chancellor, after a full hearing on the evidence, in an elaborate opinion filed, decreed in February, 1898, that defendant should account and sent the case to a master to state an account of the profits of the Grimes well. From this decree defendants appealed and it was affirmed by this court on the opinion of the court below November 14, 1898, and now after five years more with many and prolonged hearings before the master and the court below, we have this appeal by plaintiffs. Judge White, in his opinion decreeing the accounting, held that "it was very evident that the Marshall Oil Company in procuring the lease from Grimes (of the whole farm) June 19, 1888, acted in bad faith and was guilty of a

legal fraud upon the plaintiffs," and that this was for two purposes, one to get clear of drilling another well, and second to get clear of paying to plaintiffs the share of one-fourth of the profits on the sale of gas. He further held: "A share of the gas stands on the same footing as a share of the oil. A share of the oil may be delivered at the well or in pipe lines; as a share of gas could not be delivered in specie at the well or elsewhere, the only way of sharing it would be to share in the proceeds of sale."

The master then, very properly, brushed aside much of the rubbish brought into the case by defendants to shield them from fully accounting, and as he was bound to do, treated two ^{or} questions as *res adjudicata*: 1. Defendants were bound to account for one-fourth the profits from the Grimes gas-well; 2. To get at their share of the profits they were bound to show with approximate accuracy plaintiff's money share of the profits by showing the quantity of gas produced from that well. But defendants alleged the gas from the Grimes well was indiscriminately blended and mixed by defendants with that from a number of other wells of theirs, and it is impossible now to tell the quantity received from that particular well. As to this plea the master answers: "It is true they admit they were unable to determine with accuracy how much gas came from the Grimes well, but they say, having failed to keep such account, what more can we do than we have done? This might answer very well if they had innocently erred, but if the failure to keep an account is not the result of innocent error, but of a fixed purpose to secure for themselves the profits of the Grimes lease, the case is a very different one. The testimony discloses the fact that the defendant companies have acted with their eyes open and with full knowledge of the claim of plaintiffs to one-fourth the profits from the sale of gas from the Grimes well."

The master might very well find that they had acted with their eyes open; not only were the lease to Akin and the assignment of half interest by him to the other three plaintiffs before them, but they had actual notice from R. B. Stone of plaintiffs' contract and claim of right under it. In 1893 this bill was filed, yet no attempt for nearly ten years was made to keep any account of this particular well. The master finds that there was a well-known system of measurement which might, with but little trouble, have been adopted and approximate ac-

curacy of quantity obtained. Having made no effort to keep an account, with a full knowledge of their moral and legal obligation, they mingled the production of this well with their other wells, so that it is now impossible to ascertain, with even approximate certainty, the quantity. That it was very large, that it was in volume persistent and under high pressure, is not questioned.

The master having stated the facts of the confusion of plaintiffs' property with that of defendants and the fraudulent purpose in defendants' conduct, and after finding as a fact from ⁹³ the evidence that it was impossible to separate with even approximate accuracy as to quantity the product of the Grimes well from the product of defendants' other wells, finds that in law there was by defendants a confusion of goods, and to the end that he might award to plaintiffs their one-fourth share of the profits under this contract he adopts the definition of "confusion of goods" given in Dwight on Persons and Personal Property, 486, as his rule of action. That definition is as follows: "Confusion of goods, as understood in English and American law, is the willful and fraudulent intermixture of the chattels of one person with the chattels of the other, without the consent of the latter in such a way that they cannot be separated and distinguished." The master fortifies the accuracy and scope of this definition by a citation of unimpeachable authorities. In fact, there is no substantial distinction between his definition and that cited by appellees' counsel from Sutherland on Damages, section 101: "A reasonable rule which has much authority to support it is, that one who has confused his own property with that of other persons shall lose it when there is a concurrence of these two things: 1. That he has fraudulently caused the confusion; and 2. That the rights of the other party after the confusion are not capable otherwise of complete protection." Taking the facts as found by the master, there is no distinction in the applicability of either definition. So the master, governed by this rule, stated an account charging the defendants with the gross receipts of gas from October, 1888, to February, 1898, \$549,544.03, and allowing them credit for expenses and other items which reduced the amount to \$451,861.22; one-fourth of this, or \$112,965.30, he awarded to plaintiffs as their share of profits and submitted his report accordingly to the court. In the meantime Judge White, who had heard the evidence at the first hearings, and who had ad-

judged the liability of defendants to account and had appointed the master, died, so exceptions to the report were heard and passed upon by Judge Shafer, who decreed in opinion filed that the exceptions denying the application of the doctrine of the confusion of goods be sustained, and that the case be referred back to the master that he might state an account in accordance with that opinion. Accordingly, the master with great reluctance restated the ⁹⁴ account as directed by the court making the receipts from the Grimes well \$111,203.05, and one-fourth of that sum, \$27,800.76, he awarded to plaintiffs. That statement of account the court confirmed absolutely, and we have this appeal by plaintiffs assigning for error the change in the computation as directed by the court.

The reasons given by the learned judge for setting aside the account stated by the master do not convince us that his decree is correct. He says: "Upon a careful examination of the authorities cited by counsel we are convinced that the doctrine of confusion of goods is not applicable to the facts of this case." Then, after stating the substance of the contracts on which the claim of plaintiff is based, he further says: "The default of the defendants consists not in mingling the goods of the plaintiffs with their own, but in failing to keep a proper account of the proceeds of the Grimes well so as to be able to show definitely the amount of profit derived therefrom by them. The well and the gas produced from it being entirely in their own hands and control, and plaintiffs having no means whatever of keeping any account, the duty devolved upon the defendants to keep an account, and their agreement to pay to the plaintiffs the one-fourth of the profits implied an agreement to keep a reasonably definite and accurate account.

"While we are of opinion that the doctrine of confusion of goods is not to be applied so as to deprive them of the profits of one-fourth of all the gas produced from the other eighteen wells owned by them, yet the fact that negligence or fraud of the defendants has made a determination of the exact product of the Grimes well difficult and perhaps impossible, must certainly be deemed to cast on them the inconvenience and loss which may arise from the difficulties of the account, and not on the plaintiffs, who are not to blame for them."

We are at a loss to see any practical distinction between the reasons for the rule adopted from the books by the master and the reasons for the one announced by the court; nor can we see

any other rational method that could be adopted by the master which would certainly reach none other than a righteous result.

There is but little difference between the master and the court in the moral stamp put upon the conduct of the defendants, ^{as} but a very wide difference in the result of the two computations; by discarding his own computation in his first report and adopting the court's in the second, he relieves defendants of three-fourths of the award he first imposed upon them. But in the second he treats defendants exactly as equity would have treated them, if from the beginning there had been a mutual agreement that the product of the Grimes well should not be measured before it passed into the main, that then, for years it might be commingled with the gas from the other wells, and then with no means of approximating certainty, the plaintiffs' share of the profits should be computed. This is what equity would have done if both parties had been equally innocent, or rather, if both had been equally negligent. But the adoption of the court's method flatly ignores the facts found by the master and from which the court does not dissent: The gas was commingled by the fraud of defendants; in defiance of plaintiffs' right, which they well knew, they wholly neglected to keep any account of it. The master finds now that it is utterly impossible to approximate the quantity; therefore, obeying the peremptory instruction of the court, as was his duty, he could not do other than make a somewhat arbitrary estimate or guess at the quantity and so report. In doing so, he disregards the facts which the law declares would impel him to adopt the principle on which his first report is founded, and, therefore, the second report is not founded on fact or reason. By the guessing method the chances of loss or gain between the innocent plaintiffs and the culpable defendants are even. By adopting the court's method it is just as probable that defendants will gain thousands of dollars' worth of plaintiffs' gas to which they have no right as that plaintiffs will get any part of the gas to which they have no right. This is the very situation that arouses the indignation of equity, for plaintiffs did nothing to bring it about and defendants did; hence comes into operation the principle that the wrongdoer shall not profit by his wrong and the innocent party shall not suffer by it.

The principal reason given by the learned judge for not adopting the first report of the master is, that he misapplies to the

facts before him the doctrine of confusion of goods, because the plaintiffs had no property in the gas as a product or ⁹⁶ chattel, but only a right to one-fourth the profits on the sale of it. It is clear to us that this is too narrow a view of the power and functions of either law or equity; it taints them with an imbecility which would render them powerless in many cases to remedy wrongs or vindicate rights. Although such a term as "confusion of goods" is generally used, there is, in fact, properly no such doctrine as a "confusion of goods"; there is a fact of confusion of goods, which, if committed with a fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced both at law and in equity, that the wrongdoer shall not profit by nor the innocent party suffer from the wrong. It would be impossible in reaching a righteous result that any one particular method should be adaptable to the innumerable and complex transactions of the business world, or exactly to all the devices and devious ways of fraud.

Substantially, a like method is adopted with the same result in settling the accounts of negligent and faithless trustees, who have kept no accounts or have mixed indiscriminately the trust funds with their own; equity does not fear wrong to the culpable trustee, but so shapes its decrees that no possible wrong shall come to the innocent cestui qui trust. The same principle is applied to the willful trespasser, who has mixed his own ore or his own logs with those of his innocent neighbor. And as in *Kleppner v. Lemon*, 197 Pa. St. 430, 47 Atl. 353, the case of a wrongdoer who commingled the oil from his own land with that of an owner from whom he leased and willfully neglected to keep account of the respective products. Indeed, we can see no room for distinction in the application of the principle between the *Kleppner* case and the one before us. *Kleppner*, by his contract, was entitled to a royalty of one-eighth the oil from one well on his own land; the lessee had other wells on adjoining lands, then fraudulently commingled the oil from all of them and kept no account of that from *Kleppner's*; it was held that *Kleppner* was entitled to one-eighth of the whole.

The definitions heretofore quoted happen to have had in view a fraudulent commingling of chattels having a separate individuality, which might have been preserved if proper care had been taken and accounts kept by him on whom was imposed such duty, so that afterward, on settlement or adjustment, the ⁹⁷ value of each one's share of the chattels could readily be as-

lions of oil. If the chattels be willfully and fraudulently commingled, no accounts kept or other means of determining each one's share, there comes into operation the principle applicable to all transactions affected by fraud, that the wrongdoer shall not profit nor the innocent party suffer by the fraud. And the more difficult it is, from the nature or species of the chattel, to preserve the property right of the owner, the more imperative is the duty upon him who is answerable to preserve, to the extent that he is able, the evidence of the right. It makes no difference in the application of the principle that plaintiffs were entitled to one-fourth the profits of the Grimes well instead of to one-fourth the gas. Defendants' motive in first attempting the fraud was to get rid of paying one-fourth the profits of the product; then, with distinct knowledge of, and actual notice of, plaintiffs' claim, even by suit, they effectually smothered any certain evidence of the extent of their answerability by neglecting to keep accounts. Their only defense now is, we have no accounts, and as the master practically finds, they resort to guessing to determine the quantity of gas from the Grimes well. The argument of appellees' counsel, to some extent approved by the court below, is, that by their contract they acquired title to the gas, and therefore had a right to commingle it with their own. This argument evades the point at issue; the whole of the gas was in their control and custody; by their relation to the contract and to plaintiffs it was their moral and legal duty to account to and pay to the plaintiffs one-fourth the profits. They willfully neglected to keep accounts showing, even approximately, the extent of their liability, and now ask, after putting it out of their power to account, leave to guess at the amount payable to plaintiffs.

We think the facts that the entire product was by the contract the property of defendants, and that their responsibility consisted only in their duty to account for and pay over one-fourth the profits does not relieve their conduct from the application of the same principle as is applied to a fraudulent confusion of goods.

Therefore, the decree of the court setting aside the first report of the master is reversed; the second report is set aside and the ^{us} decree affirming it reversed; the appeal of J. B. Akin, C. W. Stone, R. B. Stone and A. J. Hazeltine is sustained, and the first report of the master is confirmed absolutely.

CONFUSION OF GOODS.*

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I. Nature, Scope and Effect of Confusion.

a. In General.—When there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place: *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; monographic note to *Pulcifer v. Page*, 54 Am. Dec. 589. Or, as defined in the principal case, ante, p. 904, confusion of goods is the willful and fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of the latter, in such a way that they cannot be separated and distinguished. There is no mingling of property where one puts potatoes in one end of a trench and separates them by a partition of hay from potatoes in the other end of the excavation belonging to another person: *Scott v. Schofield*, 101 Iowa, 15, 69 N. W. 1127. A confusion of the profits or proceeds of sales may be worked, so that the innocent party will be entitled to the whole, or to his proportionate share of the whole: *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639. This principle is applied in the

*REFERENCE TO MONOGRAPHIC NOTES.

Title by accession: 54 Am. Dec. 583-597; 44 Am. St. Rep. 444-448.
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case of a sale of mining claims which are not separately valued: *Huff v. Hardwick* (Colo. App.), 75 Pac. 593.

The general rule is, that if a person having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon him who produces it, and it is for him to distinguish and identify his own property or to lose it: *Kreuzer v. Cooney*, 45 Md. 582, 592. See, too, *Alexander v. Zeigler* (Miss.), 36 South. 536; *State v. Goll*, 32 N. J. L. 285; *Brakeley v. Tuttle*, 3 W. Va. 86. This rule is merely one of evidence. "The wrongful mingling of one's own goods with those of another, when the question of identification of the property arises, throws upon the wrongdoer the burden of pointing out his own goods; and, if this cannot be done, he must bear the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator; that is to say, against one who wrongfully destroys or suppresses evidence": *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 47 S. W. 95, 516. See, also, *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760.

The doctrine will not be carried further in any case than necessity requires: *Brown v. Bacon*, 63 Tex. 595; *Claffin v. Beaver*, 55 Fed. 576. It involves a forfeiture, and is never applied where it consistently can be avoided: *Keweenaw Assn. v. O'Neil*, 120 Mich. 270, 79 N. W. 183. It must be an extreme case that will justify the taking of the property of one person and giving it to another; whenever it is possible, therefore, to make a division of the property and give to each one his share, a court will make such division: *First Nat. Bank v. Scott*, 36 Neb. 607, 54 N. W. 987. And yet, in the language of the court in the principal case, ante, p. 904, a confusion of goods, if committed with a fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced at law and in equity, that the wrongdoer shall not profit by nor the innocent party suffer from the wrong.

The doctrine of the confusion of goods is comprehensively stated by Justice Fowler in *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233: "If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other article of the same kind and quality, then each may claim his aliquot part; but if the mixture is indistinguishable, because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be deter-

mined, the party who occasions, or through whose fault or neglect occurs, the wrongful mixture must bear the loss," approved in *Brooks v. Lowenstein*, 95 Tenn. 262, 35 S. W. 89.

b. Tortious Intermixture of Goods.—If an owner of goods willfully and tortiously mixes and confuses them with the goods of another, so that they are indistinguishable and insusceptible of just appreciation and division according to the rights of each owner, he by whose fault or wrong or neglect the mixture is caused must bear the whole loss, and the innocent party will take the whole property by accession: *Burns v. Campbell*, 71 Ala. 271; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Mayer v. Wilkins*, 37 Fla. 244, 19 South. 632; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501; *Ryder v. Hathaway*, 38 Mass. (21 Pick.) 298; *Jewett v. Dringer*, 80 N. J. Eq. 291; *Seavy v. Dearborn*, 19 N. H. 351; *Franklin v. Gumersell*, 9 Mo. App. 84; *Williams v. Morrison*, 28 Fed. 872; *The Idaho*, 93 U. S. 575, 32 L. ed. 978; monographic note to *Pulcifer v. Page*, 54 Am. Dec. 591-593. It is not necessary, probably, for the innocent person to prove that the mixture was actually made with the intent to defraud him, for in most cases this would be difficult to do: *Rust Land etc. Co. v. Isom*, 70 Ark. 99, 91 Am. St. Rep. 68, 66 S. W. 434.

c. Innocent Intermingling.—But the foregoing doctrine of forfeiture of the entire property in favor of the innocent party applies only to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended. The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or to take his own proportion at his peril taking care to leave to the other owner as much as belongs to him: *Hart v. Morton*, 44 Ark. 447; *Wingate v. Smith*, 20 Me. 287; *Ryder v. Hathaway*, 38 Mass. (21 Pick.) 298; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Keweenaw Acsn. v. O'Neil*, 120 Mich. 270, 79 N. W. 183; *Davis v. Krum*, 12 Mo. App. 279; *Pickering v. Moore*, 67 N. H. 533, 68 Am. St. Rep. 695, 32 Atl. 828, 31 L. R. A. 698; *Pratt v. Bryant*, 20 Vt. 333; *Brown v. Bacon*, 63 Tex. 595. See, further, the monographic note to *Pulcifer v. Page*, 54 Am. Dec. 593-594.

d. Goods Susceptible of Identification.—Moreover, the rule that one may lose his own property by mixing it with the property of another, applies only to cases where the property of one cannot be distinguished from that of the other, after the admixture: *Baldwin v. Porter*, 12 Conn. 473, 483; *Frost v. Willard*, 9 Barb. 440; *Holbrook v. Hyde*, 1 Vt. 286. There is no forfeiture if the goods are of such a character that the property of each can be identified and separated:

Capron v. Porter, 43 Conn. 383; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Moore v. Bowman, 47 N. H. 494. And this, is true although the intermixture was fraudulent: Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906; Claflin v. Beaver, 55 Fed. 576.

e. **Property of Equal and Uniform Value.**—Again, one will not forfeit his property by commingling it with the property of another when the goods, though indistinguishable, are of equal and uniform value; that is, when the mixture is approximately homogeneous. In this case the remedy is division in kind or compensation for actual loss: See Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Reid v. King, 89 Ky. 388, 12 S. W. 772; Gilman v. Hill, 36 N. H. 311; "Innocent Commingling," ante. This rule finds application in the case of confusion of grains, such as corn or oats or wheat. Each owner may claim his aliquot part of the whole mass of grain: Sims v. Glazener, 14 Ala. 695, 48 Am. Dec. 120; Muse v. Lehman, 30 Kan. 514, 1 Pac. 804; Stone v. Quaal, 36 Minn. 46, 29 N. W. 326; Kaufmann v. Schilling, 58 Mo. 218; Adams v. Meyers, 1 Saw. 306, Fed. Cas. No. 62. This doctrine is applied to manure in Pickering v. Moore, 67 N. H. 533, 68 Am. St. Rep. 695, 32 Atl. 828, 31 L. R. A. 698. Even in the case of a wrongful and fraudulent intermixture, there is no forfeiture, if the goods intermixed are of equal value and quality, and the proportion of the whole which each party originally owned is known: Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; monographic note to Pulcifer v. Page, 54 Am. Dec. 591; compare Stephenson v. Little, 10 Mich. 433. But one who willfully confounds his goods with like goods of another will lose the whole, unless he can prove the true quantity belonging to himself: Starr v. Winegar, 3 Hun, 491. Every intendment and presumption is against the wrongdoer. The rule as stated in Osborne v. Cargill Elevator Co., 62 Minn. 400, 64 N. W. 1135, is this: "Where goods of the same kind and value, belonging to different owners, are intermingled and confused by one owner willfully, but not in bad faith, the other owner does not thereby become the owner of the whole; but when the part of the whole mass belonging to the latter is, by reason of such confusion, made uncertain, every reasonable doubt as to the amount of his share must be resolved in his favor."

f. **Property Whose Value can be Estimated.**—When a person mingles his goods with those of others innocently or by mistake, if he can show their value or their proportion of the value to the whole, he should be allowed to do so, and his property should not be forfeited: Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721. Said the court in Gunter v. James, 9 Cal. 643, 660: "When articles of different values are mixed, producing a third value, the innocent party is allowed to take the whole only in case he cannot tell the original value of his property. Even in case of such a mixture, if the original value of the property mixed can be ascer-

tained, the party can only claim that value, except the mixture he willfully made with intent to injure, or from gross negligence." In case damages are awarded the injured party, the measure thereof seems to be the highest value at which his property reasonably can be estimated: See "Damages," post.

g. Property Commingled by Consent.—When the goods of two or more persons are, by consent, intermixed so that they can no longer be distinguished, the owners have an interest in common in proportion to their respective shares. In such a case the relation of the parties is that of contract, and the presumption arises that they agreed to hold the mass as tenants in common. This doctrine finds frequent application where grains are intermixed: *Low v. Martin*, 18 Ill. 286; *Van Liew v. Van Liew*, 86 N. J. Eq. 637, 641; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430; monographic note to *Pulcifer v. Page*, 54 Am. Dec. 590, 591.

h. Intermixture by Inevitable Accident or Vis Major.—Where an indistinguishable confusion of goods results from inevitable accident or vis major, the original owners become tenants in common of the mass, sharing the loss proportionately. Thus where a ship is wrecked, and a part of its cargo of cotton lost, and the remainder intermixed beyond identification, the owners are tenants in common of the bales saved, sharing the loss and expense pro rata: *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427. So, where oil leaks from the casks in the course of shipment and is collected, it belongs to the original owners as tenants in common: *Jones v. Moore*, 4 Younge & C. 351. This principle is applicable to wood floated by a freshet into one indistinguishable mass: *Moore v. Erie Ry. Co.*, 7 Lans. 39; and also, perhaps, to cattle on the range confused through accident or the wrong of a third person: *Belcher v. Cassidy Bros. Livestock Commission Co.*, 26 Tex. Civ. App. 60, 62 S. W. 924.

II. Goods and Property Confused.

a. Grain and Flour.—One may mix his grain with grain belonging to others under such circumstances that he will lose all claim thereto: *Samson v. Rose*, 65 N. Y. 411. However, where the grain is of uniform value, kind, and quality, and the quantity contributed by each to the mass is known, the parties are considered as tenants in common, and each may claim his aliquot part of the entire mass: See "Property of Equal and Uniform Value," ante; *Henderson v. Lauck*, 21 Pa. St. 359. And if the intermingling is by consent, then the several owners have an interest in common in proportion to their respective shares. See "Property Commingled by Consent," ante. The holders of receipts for grain of the same kind and quality deposited in a warehouse are ordinarily tenants in common of the mass: *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397; *Drudge v. Leiter*, 18 Ind. App. 694, 63 Am. St. Rep. 359, 43 N. E. 34; *Arthur*

v. Chicago etc. R. R. Co., 61 Iowa, 648, 17 N. W. 24; Hall v. Pillsbury, 43 Minn. 33, 19 Am. St. Rep. 209, 44 N. W. 673, 7 L. R. A. 529.

Where wheat has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat is entitled to such portion of the flour as the grain probably would produce: First Nat. Bank v. Scott, 36 Neb. 607, 54 N. W. 987. See, also, Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430; note to Pulcifer v. Page, 54 Am. Dec. 590.

b. **Cattle, Horses and Fowls.**—It has been said that the doctrine relating to confusion of goods has no application to horses and cattle that may be readily identified: See Holbrook v. Hyde, 1 Vt. 286; McKnight v. United States, 130 Fed. 659; "Goods Susceptible of Identification and Separation," ante. It is obvious, however, that livestock on the range may become so intermingled as to render identification impossible. In Belcher v. Cassidy Bros. Livestock Commission Co., 26 Tex. Civ. App. 60, 62 S. W. 924, where mortgaged cattle were so confused that it became impossible to identify the precise animals covered by the mortgage, the court said: "While a mixture of cattle on the range may not be altogether analogous to a mixture of cotton, corn, coffee, tea, wine, etc., we nevertheless are of opinion that equity is not without power to afford a remedy in such case for a confusion resulting from accident or the wrong of a third person, where, as in this instance, the proportion of interest of each claimant may be reasonably ascertained notwithstanding the confusion." It was held, however, that it was error to direct the sheriff to partition the herd by seizure and sale as under execution, the fair average of all the animals; for the power thus conferred was judicial, and one which the court, and not the sheriff, must exercise.

If one places his brand upon another's cattle so that the distinction between them cannot be traced, he should be subjected to the loss of his property. Upon him rests the task of identifying or distinguishing the animals: Johnson v. Hocker (Tex. Civ. App.), 39 S. W. 406.

Where one's fowls mingle with his neighbor's, he has a right to his own, though he cannot identify them all; and his neighbor's offer to deliver him those he can identify, and any others he may select to a certain number, less than he claims and less than his testimony tends to show him entitled to, which he refuses, does not satisfy his right. If the neighbor shuts up the entire flock, and refuses to let them run at large so that the fowls may be identified and distinguished, this amounts to a conversion: Leonard v. Belknap. 47 Vt. 602.

c. Logs, Lumber and Other Timber.—Confusion of goods may occur by the commingling of logs, lumber, shingles, or other timber: *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Bryant v. Ware*, 80 Me. 295; *Starke v. Paine*, 85 Wis. 633, 55 N. W. 185. There can, however, be no confusion of logs, in the legal sense of the term, when they are marked so that their identity is not lost: *Goff v. Brainerd*, 58 Vt. 468, 5 Atl. 393. Where one takes another's logs, saws them into boards, and mixes them with his own lumber so that they cannot be distinguished, with the fraudulent intent of depriving the owner of his property, the latter may maintain replevin, it has been held, for the whole pile of boards: *Wingate v. Smith*, 20 Me. 287. The injured party may replevy the whole body of mixed lumber where one willfully and indiscriminately intermixes his own lumber with that of another so that they cannot be distinguished, and where the two lots so mixed are of different qualities or values: *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675; *Root v. Bonnewa*, 22 Wis. 539. See the note to *Pulcifer v. Page*, 54 Am. Dec. 592. The owner of lumber sawed from logs which the manufacturer has mingled with his own logs of like quality may reply out of the common mass of the lumber made from all the logs, an amount not exceeding his contribution thereto: *Bent v. Hoxie*, 90 Wis. 625, 64 N. W. 426.

Where one has a pile of mill logs of a particular mark on a landing, and another person draws logs into the same pile and puts the same mark upon them, the latter can maintain replevin for such logs only as he can identify: *Dillingham v. Smith*, 30 Me. 370. Where logs of the same kind, value, and mark become intermixed, without the fault of either of the owners, before they reach the mill, each may claim his specific quantity of the lumber sawed therefrom, though he may be unable to identify his specific logs: *Martin v. Mason*, 78 Me. 452, 7 Atl. 11.

If a person innocently cuts another's timber and mingles the logs with his own, the owner of the timber may reclaim from the common mass a quantity equal in amount to the logs cut, and of an average quality: *Gates v. Rife Boom Co.*, 70 Mich. 309, 38 N. W. 245. See, too, *Stearns v. Raymond*, 26 Wis. 74; *Eldred v. Oconto Co.*, 33 Wis. 133. So, if one person cuts another's timber and converts it into staves, which he mingles with others, the owner, being unable to identify his property, may maintain replevin for a portion of the common lot equal to the number of staves taken from his land: *Peterson v. Polk*, 67 Miss. 163, 6 South. 615.

If one by mistake cuts logs upon the land of another, and after discovering his mistake mingles them with his own and floats them down the stream, the owner may retake his logs, or such an average number out of the mass as will replace those lost: *Arpin v. Burch*, 68 Wis. 619, 32 N. W. 681.

Where a person, in filling his contract to deliver a certain number of railroad ties, delivers an amount in excess of the number called for, which the buyer refuses to accept, and, by the act of the first party and without the fault of the buyer, the surplus ties become intermingled with the accepted ones so as to be indistinguishable therefrom, the buyer has a right to take and use from the common mass his proportionate share, without restriction in choice to any particular portion of the lot, provided there is no advantage in selection as to quality, value, or otherwise: *Chandler v. De Graff*, 25 Minn. 88.

d. **Ore and Mineral**.—According to *Hawkins v. Spokane Hydraulic Min. Co.*, 3 Idaho, 650, 33 Pac. 40, where a mining corporation works a mining claim in which it has a minority interest, against the protest of the majority interest, and mingles with the gold extracted therefrom a portion of gold from its own claim, without the consent of the other party, and the quantity and value of such portion are unknown, it cannot recover the gold so mingled. One who mixes another's coal with his own, and sells the mass, cannot set up that the coal mixed with his own was of inferior quality and thus diminished the price received, but the innocent party is entitled to the full value of his coal: *Lord Rokeby v. Elliott*, L. R. 13 Ch. Div. 277.

e. **Oil and Gas**.—Where one person mixes with his own oil the oil of another, the latter may replevy his aliquot part of the mixture, at least if the character of the oil has not been so essentially changed by the confusion that one barrel is not equivalent to another. If a lessee, to evade the payment of royalties under an oil and gas lease, instead of operating the property in accordance with his covenants, drills a well on adjoining land, so as to drain the oil and gas under the leased land and to make it impossible to determine the amount drawn from the lessor's property, the lessee is bound to pay royalties on the entire product: *Kleppner v. Lemon*, 197 Pa. St. 430, 47 Atl. 353. And if a natural gas company fraudulently commingles gas from leased property with gas from other properties under its control, keeping no account thereof, it is bound to account to the owner of the leasehold, who is entitled to one-fourth of the profits, therefrom, for one-fourth of the profits from the whole volume of gas confused. See the principal case, ante, p. 904.

III. Persons Involved and Affected.

a. **Third Persons Generally**.—The general rule that as between an innocent person and a wrongdoer, where the property of the former has been mingled with and cannot be separated from that of the latter, the entire bulk may be adjudged to the former, should not be applied where the interests of other persons intervene, and full protection can otherwise be given to the innocent party whose goods

have been wrongfully used: *National Park Bank v. Goddard*, 30 N. Y. Supp. 417, 9 Misc. Rep. 626.

If a mortgagor of chattels, without the consent of the mortgagee, confuses the goods with those of a third person, and the latter, with the consent of the mortgagor, converts the common property into money, with actual or constructive knowledge of the facts, such third person is answerable to the mortgagee as for money had and received, though only to the extent of the amount due on the mortgage indebtedness: *Illinois Trust etc. Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54, 94 N. W. 777.

Where a miner allows his tailings to mingle with those of other miners, this does not give to a stranger a right to the mixed mass: *Jones v. Jackson*, 9 Cal. 237.

b. Purchasers of Goods.

1. *In General*.—Ordinarily, when a person wrongfully confuses his goods with those of another, an innocent purchaser from the wrongdoer acquires no greater rights than his vendor had: *Blodgett v. Seals*, 78 Miss. 522, 29 South. 852. Cases may arise, however, where a bona fide purchaser of confused goods should be protected: *Johnson v. Johnson*, 49 Mich. 641, 14 N. W. 673. See, further, the note to *Gaskins v. Davis*, 44 Am. St. Rep. 447-449.

2. *In Case of Sale in Fraud of Creditors*.—The intermingling by a furniture dealer, with his other goods, of furniture sold him in fraud of the seller's creditors, without an unlawful motive on the part of the buyer, does not entitle the seller's creditors to attach the buyer's entire stock of goods, without requesting him to point out the goods held under such sale: *Smith v. Sanborn*, 72 Mass. (6 Gray) 134. And, if one buys goods, knowing the sale to be in fraud of creditors, and mingles them with his own, he does not thereby forfeit his whole stock to the vendor's creditors; but if he refuses to point out the goods, the creditors may levy on an amount of the confused property sufficient to equal the goods of the vendor: *Evans v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. 219. The rule in such cases, according to *Bergson v. Dunham* (Tex. Civ. App.), 40 S. W. 17, is that if a person fraudulently purchase goods, and mingles them with his own so that they cannot be identified, the defrauded creditor has the right to seize so much of the goods as is necessary to satisfy his claim, provided he does not seize goods exceeding in value those purchased. If a party to a scheme to defraud creditors purchases goods and mixes them with his own, it is his duty, primarily, to at least inform an officer seeking to levy an attachment against the fraudulent vendor that he has made additions to the stock; and if he fails to make known that he has other goods mixed with those he claims under the fraudulent purchase, which he can identify, and permits the officer, in ignorance of the facts, to levy

upon all the goods, he may be estopped to assert that a part of the goods levied upon are not subject to the levy: *Reiss v. Hanchett*, 141 Ill. 419, 31 N. E. 165. See, also, *Blotcky Bros. v. Caplan*, 91 Iowa, 352, 59 N. W. 204.

c. **Debtor and Creditor—Attachment and Execution.**—In the case of the levy of an execution or attachment against a debtor on his property, which another person has fraudulently confounded with his own, if the latter would reclaim and save his own property, the burden is on him to distinguish it from that of the debtor: *Weil v. Silverstone*, 69 Ky. (6 Bush.) 698 (citing *Treat v. Barber*, 7 Conn. 274; *Smith v. Sanborn*, 72 Mass. (6 Gray) 134; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233); *Edridge v. Fidelity & Deposit Co.* (Tex. Civ. App.), 63 S. W. 955. Where goods of a debtor are mixed with those of another, but in such a way that they are distinguishable, it is the duty of the officer about to levy an attachment to make reasonable inquiries in order to distinguish them before he is justified in taking the goods of the other person; but where the goods are mingled in one indistinguishable mass, and he who has confounded his with the debtor's does not point out his own, the officer may take them all: *Shumway v. Rutter*, 8 Pick. 443, 19 Am. Dec. 340; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233; *Taylor v. Jones*, 42 N. H. 25; monographic note to *Pulcifer v. Page*, 54 Am. Dec. 593, where this question is further discussed; "Sale in Fraud of Creditors," ante. Though the goods of a debtor are mixed with those of a stranger without the latter's knowledge, it seems the sheriff may attach and hold the whole until the stranger identifies his property and demands a redelivery: *Lewis v. Whittemore*, 5 N. H. 364, 22 Am. Dec. 466. But where the owner can distinguish his goods, and points them out to the officer, the latter will be a trespasser if he takes them: *Yates v. Wormwell*, 60 Me. 495.

When a debtor wrongfully produces a confusion of goods, and thereby loses his right to the whole, it seems his creditors have no right or claim to levy an attachment upon it: *Beach v. Schmaltz*, 20 Ill. 185. So, where the creditors of an agent who has forfeited his goods by confusing them with his principal's, cannot subject them to the payment of their debts: *Brooks v. Lowenstein*, 95 Tenn. 262, 35 S. W. 89.

d. Mortgagor and Mortgagee.

1. **In General.**—A confusion of mortgaged goods by the mortgagor with other goods owned by him makes the whole mass, *prima facie* at least, subject to the lien and operation of the mortgage: *Burns v. Campbell*, 71 Ala. 271; *Edelhoff v. Homer-Miller Mfg. Co.*, 86 Md. 595, 39 Atl. 314; *Dunning v. Stearns*, 9 Barb. 630. But where the property is of like kind and equal value, a more equitable rule would be to give each party his due proportion, rather than to subject the

entire property to the mortgage: *Mittenthal v. Heigle* (Tex. Civ. App.), 31 S. W. 87. Where the mortgagor of a stock of jewelry and fixtures and subsequent purchasers thereof commingle new goods therewith so that the mortgagee cannot identify the goods not covered by the mortgage, he may be justified in selling the entire stock, and will not be liable for conversion in the absence of a demand for the goods before action is brought: *Gibson v. McIntire*, 110 Iowa, 417, 81 N. W. 699, citing *Diversey v. Johnson*, 93 Ill. 547; *Willard v. Rice*, 11 Met. 493, 45 Am. Dec. 226; *Adams v. Wildes*, 107 Mass. 123; *Fowler v. Hoffman*, 31 Mich. 215. And one selling goods to a mortgagor, with knowledge that he probably will mix them with other goods to which the mortgagee is entitled, has the burden of designating the goods: *Kreth v. Rogers*, 101 N. C. 263, 7 S. E. 682. The obligation rests on one who unlawfully converts goods upon which there is a mortgage, and mingles them with other similar property free from encumbrance, to separate the goods: *Stuart v. Phelps*, 39 Iowa, 14. See, also, "Third Persons Generally," ante. Trespass does not lie against a mortgagee for taking chattels, mixed with his own so that they cannot be distinguished by another, who refuses to separate them: *Fuller v. Page*, 28 Ill. 358, 79 Am. Dec. 379. A mortgagee, where the goods are confused, ordinarily acquires no better title than the mortgagor had: *Lance v. Butler* (N. C.), 47 S. E. 488.

If mortgaged goods are, with the presumed permission of the mortgagee, confused with goods subsequently acquired by the mortgagor, the rights of third parties should not be affected thereby: *Hamilton v. Rogers*, 8 Md. 301. Where after-acquired goods have been confused with goods covered by a mortgage, with the knowledge and for the benefit of the mortgagee, a judgment creditor of the mortgagor may lawfully levy upon and sell the whole or so much thereof as is necessary to satisfy his debt: *First Nat. Bank v. Lindenstruth*, 79 Md. 136, 47 Am. St. Rep. 866, 28 Atl. 807.

2. **Purchaser of Mortgaged Goods.**—Where a mortgagor of goods purposely or carelessly mixes them with his own and then sells the whole, it has been held that the mortgagee may replevy the whole from the purchaser, if the goods cannot be distinguished: *Adams v. Wildes*, 107 Mass. 123. To the same effect, see *Willard v. Rice*, 11 Met. 493, 45 Am. Dec. 226. If the mortgagor mingles the property with goods of a third person of like quality and value so that separation is impossible, the mortgagee may take under foreclosure his aliquot part of the entire mass in the possession of a purchaser: *Horne v. Hanson*, 68 N. H. 201, 44 Atl. 292.

e. **Principal and Agent.**—If an agent confounds his own property with that of his principal, he does so at his own risk. The burden is on him to show which is his own, and if this cannot be done, he must ordinarily lose what he has contributed: *Hall v. Page*, 4 Ga.

428, 48 Am. Dec. 235; *Hooley v. Gieve*, 9 Abb. N. C. 8; *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488; *Yates v. Arden*, 5 Cranch C. C. 526, Fed. Cas. No. 18,126. And attaching creditors of the agent occupy no more favorable ground than the agent himself: *Brooks v. Lowenstein*, 95 Tenn. 262, 35 S. W. 89.

If an agent mingles his own funds with his principal's, he must disclose the amount of his money, otherwise his principal will take all: *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77. No personal responsibility attaches to the act of an agent in mingling his own funds with those of his principal, when he does so in good faith, and no detriment results to the principal: *Wood v. Cooper*, 49 Tenn. (2 Heisk.) 441. It is said that an agent may not mingle his funds with his principal's, and then hold the latter responsible for the depreciation of the money in his hands: *Webster v. Pierce*, 35 Ill. 158.

f. **Bailor and Bailee.**—Where the bailee of property so commingles it with his own that its identity cannot be traced, all the inconvenience of the confusion is thrown upon him; but if the owners have consented to the commingling, each remains the owner of his share in the common stock: *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. Rep. 706, 11 Atl. 893.

g. **Husband and Wife.**—When a husband has mortgaged crops growing on his own and his wife's land, and some of them are intermingled and mixed after his death so that they cannot be distinguished or divided, the loss, as between the wife and the mortgagee must fall upon her as the one entitled to the possession and as the one through whose fault or neglect the wrongful mixture has occurred, although she would otherwise be entitled to the whole of the crop grown on her land: *Wells v. Batts*, 112 N. C. 283, 34 Am. St. Rep. 506, 17 S. E. 417.

IV. Remedies and Their Enforcement.

a. **Replevin.**—Where there has been a confusion of goods so that the innocent party is entitled to the entire mass he may replevy the same: *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675. And while replevin does not usually lie if the property sought to be recovered is not susceptible of identification and separation so as to be seized in kind, still, where goods of the same general kind and value are confused, although not susceptible of an actual separation by identifying each particle, each party may claim his aliquot part, and enforce his claim by an action in replevin. This rule has been recognized in the case of a confusion of grain: *Kaufmann v. Schilling*, 58 Mo. 218; *Henderson v. Lauck*, 21 Pa. St. 359; and in the case of a confusion of staves: *Rust Land etc. Co. v. Isom*, 70 Ark. 99, 91 Am. St. Rep. 68, 66 S. W. 434; and, also, where logs are confused: *Young v. Miles*, 20 Wis. 615; *Eldred v. Oconto Co.*, 33 Wis. 133. See, further,

“Property of Equal and Uniform Value”; “Logs, Lumber, and Other Timber.”

b. **Damages.**—In case damages are given the owner of goods which another person has so confounded and confused with his own that identification and separation are impossible, the measure thereof, it is said, will be the highest value at which the property reasonably can be estimated: *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760; *Hart v. Ten Eyck*, 2 Johns. Ch. 62. The measure of damages for the conversion of property by mistake, at the place where it was about to be sold, in case the defendant removes it to another town and mixes it with other similar property so that it cannot be identified, is the value of the property at the place and time of conversion, with such increase as it may have received from fluctuations in the market and other causes independent of the defendant's acts: *Weymouth v. Chicago etc. Ry. Co.*, 17 Wis. 550, 84 Am. Dec. 763.

c. **Demand.**—Where the plaintiff intermingles the defendant's logs with his own, and the defendant, being unable to identify his logs, but in good faith, intending to retake only his own, actually takes more, he is not liable as a wrongdoer until the plaintiff points out his property and demands it: *Smith v. Morrill*, 56 Me. 566. And where one suffers his goods to be so mingled with those of another that an officer having a writ against those of the other cannot distinguish them, he cannot maintain an action against the officer after he seizes them, until notice and a demand and refusal: *Smith v. Welch*, 10 Wis. 91. If a person's goods are mingled with a debtor's and the entire mass is levied on, it is incumbent on him to claim his particular property and assert his claim thereto; otherwise he may be held to have waived his rights: *Zielke v. Morgan*, 50 Wis. 560, 7 N. W. 651.

SPARKS v. HURLEY.

[208 Pa. St. 166, 57 Atl. 364.]

GIFT.—The Acceptance of a Gift may be Presumed. (p. 928.)

GIFT of Stock by Transfer on Books.—A Husband may make a gift of stock to his wife by a transfer of an account from his name to hers, upon the books, although she does not know of it at the time and does not then accept it. (p. 929.)

TROVER—Sale of Stock by Broker.—If a Husband transfers an account with a stock broker from his own to his wife's name, she may maintain an action for trover and conversion against the broker, if he, without notice to her, sells securities in the account for the husband's debt. (p. 930.)

E. C. Shapley and John G. Johnson, for the appellants.

Ellis Ames Ballard and Rufus E. Shapley, for the appellee.

170 POTTER, J. This was an action of trover and conversion to recover the value of nine hundred shares of capital stock of the Consolidated Lake Superior Company. The plaintiff, Julia M. Sparks, was the wife of Edward K. Sparks, and the defendants, William H. Hurley, Jr., & Company are stock brokers doing business in the city of Philadelphia. Plaintiff alleged that on October 28, 1901, Edward K. Sparks, her husband, who had been a customer of the defendants' firm, arranged with them to open an account for her under the name of J. M. Sparks, and that with their consent and approval, he transferred to the new account seven hundred shares of Consolidated Lake Superior stock. At the same time he gave to them one hundred additional shares of the same stock to be credited to the J. M. Sparks account; and some two months later deposited one hundred shares more with them on her account, making nine hundred shares in all. This stock was held subject to, and was security for, loans made by defendants thereon amounting to \$19,600.

The account was accepted by defendants and entered upon their books in accordance with this arrangement. It did not appear that the plaintiff herself was informed of the transaction until the following April, after the stock had been sold. But prior to the sale the defendants sent to her at least two statements of the account addressed to "Mrs. J. M. Sparks." On April 18 and 19, 1902, the defendants, without notice to the plaintiff, or any previous demand upon her for payment of the loans for which the stock was held by them as collateral, sold

the entire nine hundred shares, realizing sufficient to pay the amount due them and to leave a balance of \$662.89. On April 30, 1902, Mrs. Sparks first learned of the transaction from her husband, and that the stock had been sold; and on May 3, 1902, she tendered to defendants the amount due to that date upon the loans and demanded the surrender of the stock, which was refused. She then brought this action for damages, alleging the conversion of the stock.

The defendants claimed that they had had no business relations whatever with the plaintiff, that all their dealings had¹⁷¹ been with Edward K. Sparks on his own individual account; that the J. M. Sparks account was opened, at the suggestion of E. K. Sparks, merely for the purpose of having a separate account of this particular stock, but that there was no change in the ownership of the stock intended; that they were not informed and did not know that J. M. Sparks was the name of Mrs. Sparks or of any existing person, that the statements made out to "Mrs. J. M. Sparks" were addressed in that way inadvertently by one of their clerks; that they had frequently notified E. K. Sparks to call at their office and requested him to put up additional collateral; that the sale of all his securities, including the J. M. Sparks stock, still left him nearly \$3,000 in their debt.

Upon the trial the court below submitted to the jury the question whether the plaintiff by virtue of what took place between her husband, Mr. Sparks, and the defendants, became the owner of the securities in question, and the bona fide owner of the account, or whether the arrangement was simply a fictitious one under which it was understood by both parties that the real ownership of the stock was to be left in Mr. Sparks. The court declined to give binding instructions for the defendants, but reserved the question of law whether there was any evidence on which the plaintiff could recover. The jury found for the plaintiff in the sum of \$8,615.42, being the value of the stock on the day the tender was made, less plaintiff's indebtedness to defendants, and the court in bank dismissed the motion of defendants for judgment in their favor on the point reserved and entered judgment upon the verdict.

The assignments of error are not specifically pressed in the argument, but counsel for appellants urge generally that the plaintiff showed no right to recover. The jury have found, however, as a matter of fact, in answer to the questions submitted to them, that Mrs. Sparks was the real owner of the

securities, and that the account in question was accepted by the defendants and was being carried upon their books for her. In support of this finding there is evidence that the defendants, in the regular course of their business as brokers, permitted the husband to transfer the account to the name of his wife, and in lieu of the liability to him, there was substituted the liability to account to her, and that they accepted at the same ¹⁷² time a good consideration in the shape of additional security; that they rendered statements of the account thereafter in her name, and received at a subsequent time additional margin and receipted for it in her name. It also appears that they subsequently sold these securities without her knowledge or consent and without notice to her husband as to this account, who was admittedly her agent with respect to its care and management.

It is not the husband who here denies the right of the wife to these securities, but it is the brokers who at the time it was made assented to the transfer upon their books and the opening of the new account in the name of the wife. The defendants need not have assented, and presumably they would not have done so, had the transaction impaired the account of the husband, or affected it in any injurious manner. But counsel for appellants now urge that there could be no valid gift to the wife of the account or of the margin in the securities represented, because she did not know of it at the time it was made, and did not then accept it. But the acceptance of a gift may be presumed. In *Smith v. Bank of Washington*, 5 Serg. & R. 318, a father executed a transfer of bank stock to his daughter, then at distance, without her knowledge, and delivered it to the cashier of the bank for her use. Chief Justice Gibson said: "The transfer was made according to the mode established under the act of incorporation, and was good without an express assent of the daughter. There was a good consideration, and as the subject matter was incapable of passing by actual delivery, the daughter's assent, the grant being beneficial to her, will be presumed." In *Allen v. McMasters*, 3 Watts, 181, this court said: "It does not follow in the present instance that there may not have been a gift to Mrs. Jones without her being informed of it." And the court further said (page 187): "The ignorance of a grantee will not impede the operation of a conveyance, his assent being presumed." And in *Hostetter v. Hollinger*, 117 Pa. St. 606, 12 Atl. 741, we find: "It is well settled in a series of decisions, that he for whose benefit a promise is made, may

maintain an action upon it, although no consideration from him to the defendant, nor any promise from the defendant directly to the plaintiff: See *Hind v. Holdship*, 104, 26 Am. Dec. 107. As a general rule, a plaintiff cannot enforce a contract to which he is a stranger, yet a plaintiff cannot withhold property of the plaintiff merely because he received it from a third person."

It was not necessary in the present case that an account should be shown. The acceptance of the account and opening it in the name of the plaintiff in the books of the defendants, in accordance with the usual known custom in that line of business, created a liability for the amount found due from the transaction.

We must assume that the finding of the jury establishing the contention of the plaintiff that she was the party intended to be benefited by the arrangement between her husband and the defendants.

The facts in this case are somewhat like those in *Appeal*, 85 Pa. St. 84. The syllabus there is: T. transferred stock to F., a niece of his wife, on the books of a company, but retained the certificates in his possession, and after his death they were found in an envelope with his own signature and that of F. indorsed thereon. F. had no knowledge of the transfer. She lived in the family of T. and was in all respects treated and regarded as his daughter. Held (affirmed by the court below), that the transfer on the books of the company vested in F. the legal title to the stock, and she was bound to the same. In the opinion of Judge Thayer, adopted by the court, it was said: "But here the gift is complete by his delivery of the thing itself, for transferring the shares to her on the books of the company is putting her in complete possession of the thing assigned and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no evidence of a design to part with the right of property in anything other than an absolute transfer of the legal title for her own use."

In the present instance the transfer of the account from the name of the husband to that of the wife upon the books of the brokers would seem to be as complete a conveyance of the right of action as the nature of the case will admit.

The right of the plaintiff to recover here is sustained by the principle recognized as an exception to the ordinary rule in such cases as *Kountz v. Holthouse*, 85 Pa. St. 235, which arose ¹⁷⁴ out of the sale of a partnership interest. Mr. Justice Mercer there said (page 237): "The general rule is that an action on a contract, whether express or implied, must be brought in the name of the party in whom the legal interest in such contract was vested: 1 Chitty on Pleading, 2. Yet many cases are to be found in which the right of a third person to sue has been sustained on a promise made to another. Hence, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. This right of action is not restricted to cases of money only, but extends to an agreement to deliver over any valuable thing, so that such third person is the only party in interest." And in *Adams v. Kuehn*, 119 Pa. St. 76 (85), 13 Atl. 186, we find that "Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or delivery, he can release the promisor from performance or compel performance by suit." And further on in the same case it is said that where "the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary and the promisor is turned in effect into a trustee."

The real questions of fact arising in this case were, with careful discrimination, pointed out and submitted to the jury by the learned trial judge, and the evidence was, we think, sufficient to support the verdict.

The assignments of error are overruled, and the judgment is affirmed.

Mitchell, C. J., and Thompson, J., dissent.

The Essentials of a Valid Gift are discussed in *Waite v. Grubbe*, 43 Or. 406, 73 Pac. 206, 99 Am. St. Rep. 764, and cases cited in the cross-reference note thereto; *Opitz v. Karel*, 118 Wis. 527, 99 Am. St. Rep. 1004, 95 N. W. 948. Acceptance of a gift need not be made immediately; it is sufficient if accepted before revocation: *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843. The gift of a bank deposit may be affected, though there is no change of credit on the books of the bank: *Murphy v. Bordwell*, 83 Minn. 54, 85 Am.

St. Rep. 454, 85 N. W. 915, 52 L. R. A. 849. As to what a gift of stock, see *First Nat. Bank v. Holland*, 99 Va. St. Rep. 898, 89 S. E. 126, 55 L. R. A. 156; *Victor G. B. Bloede*, 84 Md. 129, 57 Am. St. Rep. 373, 34 Atl. 1127, 107; *Bond v. Bean*, 72 N. H. 444, ante, p. 686, 57 Atl. 340.

LENGERT v. CHANINEL.

[208 Pa. St. 229, 57 Atl. 561.]

EXECUTION SALE—Setting Aside After Reversal.—A rule to set aside a sheriff's sale taken after receipt of the purchase money, the delivery and recording of the deed, and the obtaining of possession by the purchaser, is too late; it does not affect the question that the plaintiff in the execution sale was a bona fide purchaser, and the judgment has been reversed. (p. 932.)

EXECUTION SALE—Reversal of Judgment—Restitution.—An execution creditor who purchases at the sale is within the protection of a statute providing that where land has been sold under a judgment issued upon a judgment afterward reversed, the land shall be restored, but there shall be restitution only of the money which the property was sold for. (p. 933.)

William S. Divine, for the appellant.

W. H. G. Gould and Francis E. Bucher, for the appellee.

230 FELL, J. The plaintiff in an action on a judgment obtained judgment ²³¹ for want of a sufficient affidavit of defense. The defendants appealed, but failed to make a supersedeas by entering security, as required by the act of 19, 1897 (Pub. Laws, 67). The plaintiff, notwithstanding the appeal, proceeded to collect his judgment and caused the land to be sold by the sheriff, and through his attorney became the purchaser thereof. Twenty days after the acknowledgment and delivery of the sheriff's deed, the judgment was reversed by the court on the ground that the averments of the affidavit of defense were sufficient to entitle the defendants to a new trial. A month after the reversal of the judgment the plaintiff obtained two rules: one to show cause why the sale should not be set aside, the other to show cause why a writ of restitution should not issue. After hearing by the court the first rule was discharged, and the second was made absolute, and it was directed that "a writ of restitution of the price for which the mortgaged lands were sold at the execution sale issue returnable sec. leg." This appeal is from the

The defendant's contention as to the latter is that the land should have been restored, and if not this, then the full value thereof and not merely the price at which it was sold.

The rule to set aside the sheriff's sale was taken after the payment of the purchase money, the acknowledgment, delivery and recording of the sheriff's deed, and possession obtained by the purchaser. It was too late, because the court was without power to act by rule. If there was doubt as to this subject before it was set at rest by the opinion in *Evans v. Maury*, 112 Pa. St. 300, 3 Atl. 850, in which it was said: "We have no doubt as to the proper rule. The delivery of the deed by the sheriff after it had been properly acknowledged, the sale confirmed and the purchase money paid vests the title in the purchaser. It is a good title until it is proved that he obtained it by fraud, involving in most cases a conflict of testimony. . . . It is a very great stretch of power, far greater than any chancellor ever exercised, to dispose of such grave questions in a summary manner. We cannot concede the power of any single judge of wresting a man's title from him on a rule to show cause." This ruling was followed in the recent case of *Media Title etc. Co. v. Kelly*, 185 Pa. St. 131, 64 Am. St. Rep. 621, 39 Atl. 832. It does not affect the question that the plaintiff in the execution was the purchaser²³² at the sheriff's sale and that the judgment on which the sale was founded has been reversed. His title was perfected by the acknowledgment and delivery of the deed, and it could not be taken from him by this process. The question was the power of the court, no fraud having been practised on it, to set aside the sale in a rule to show cause, and it has been settled that the court has not this power.

The ninth section of the act of 1705 (1 Sm. L. 57) provides that where the land has been sold under a writ issued upon a judgment which was afterward reversed, the land shall not be restored, but there shall be "restitution in such cases only of the money or price for which such lands were or shall be sold." It is conceded that if the land had been purchased by a stranger his title would be unquestionable, and that there could be no restitution. But it is argued that since the purchaser was the execution creditor, he is not a bona fide purchaser and within the protection of the act. We see no reason whatever for the imputation of mala fides to the appellee. By a regular course of proceeding in a court of competent jurisdiction he obtained a judgment perfectly valid on its face, and

followed the course pointed out by law for its col did only what the law gave him the right to do, pellants' trouble has arisen from their own failu the course prescribed by law to suspend proceeding judgment. The act of 1705 makes no exception right of an execution creditor, and we can make : ing the long period the act has been in force then but few decisions on the question but these all view that no distinction can be drawn between a the plaintiff and a purchase by a stranger to the Arnold v. Gorr, 1 Rawle, 223, it was said: "I see n or reason for a difference, between the case of the the execution becoming a purchaser, and that of The act of assembly is general in its provisions in purchasers, and I see no reason in restraining it only." The dicta to the contrary in some earlier disproved in this opinion. This statement of distinctly approved in Hale v. Henrie, 2 Watts, 1 Dec. 289; Warder v. Tainter, 4 Watts, 270; Tarbox Watts, 398, 31 Am. Dec. 478.

It is sufficient answer to the contention that the ~~283~~ ordered should have been the value of the lan the act prescribes what shall be restored as the mo for which the lands were sold, and the court had exceed this limit.

The orders are affirmed.

The Reversal of Judgments is the subject of a monogre Cowdery v. London etc. Bank, 96 Am. St. Rep. 124-146 to Blake v. Wolfe, 111 Ky. 840, 98 Am. St. Rep. 434, 6 the title acquired by the purchaser at a judicial sale, al the plaintiff in the action, is not divested by a subsequ of the judgment. But see Di Nola v. Allison, 143 Cal. 976 ante, p. 84, and authorities cited in the cross-re thereto. As to the right to restitution upon the reverse ment, see Florence Cotton etc. Co. v. Louisville Bank Ala. 588, 100 Am. St. Rep. 50, 36 South. 456; Di Nola v. Cal. 106, ante, p. 84, 76 Pac. 976.

BLAIR v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

[208 Pa. St. 262, 57 Atl. 564.]

BENEFIT SOCIETY—Relation to Members.—A benefit society sustains a relation to its members other than that of a mere life insurance company; the fund raised is practically a trust fund made up of their contributions. (p. 936.)

BENEFIT SOCIETY—Payment of Less than Face of Certificate.—If a widow presents her husband's death certificate of five thousand dollars to a benefit society for payment, without knowledge that after the issuance of the certificate it had been enacted by by-laws that two thousand dollars should be the highest amount paid upon any death, and surrenders the certificate and accepts nineteen hundred dollars on the representation that this is all she is entitled to, she may maintain a bill in equity against the society to compel the return of the certificate, to make discovery of the condition of the emergency fund, and to pay the face of the certificate, less the amount already received. (p. 937.)

EQUITY—Jurisdiction in Equity Depends not so much on the want of a common-law remedy as upon its inadequacy, and its exercise often rests in the discretion of the court; in other words, the court may take upon itself to say whether the common-law remedy is, under all the circumstances and in view of the conduct of the parties, sufficient for the purpose of complete justice. (p. 937.)

Edgar Dudley Faries and Frederick J. Geiger, for the appellant.

J. F. B. Atkin and Murdoch Kendrick, for the appellee.

²⁶³ DEAN, J. On February 25, 1889, the defendant, a beneficial organization, issued its certificate to Henry C. Blair, whereby it agreed to pay to Mary L. Blair, his wife, upon the death of her husband, \$5,000 on condition of the husband's compliance with the by-laws of the company. The husband did comply with all the by-laws, and on the face of the certificate his widow was entitled to payment of the \$5,000; but it appeared that on August 1, 1900, about eleven years and five months after the issue of the certificate and about six months before the death of the husband, the supreme council of the order adopted this by-law: "Two thousand dollars shall be the highest amount paid by the order on the death of a member upon any benefit certificate heretofore or hereafter issued. This sum shall be paid upon the death of every member holding a benefit certificate ²⁶⁴ of two thousand dollars or over provided that the face value of the benefit certificate shall be paid

to be used in their own aid or relief in the misfortunes of sickness, injury or death." He then goes on to show that the fund thus raised is practically a trust fund, made up of the contributions of the members; it is in no sense a corporation for profit although the particular amount to which any one member is entitled rests on an express contract. This charter declares that its purpose is to unite its members fraternally, to give them moral and material aid, to establish a fund for the relief of the sick and distressed, to establish a benefit fund out of which on the death of a member a sum not exceeding \$5,000 shall be paid to the family, orphans, or those dependent on the deceased member. When this widow called upon the officer and requested payment of her certificate of \$5,000, she was met by the answer that she was only entitled to \$1,900. When she sought an explanation, she was told to "take that or nothing."

It seems to us the widow of a deceased member of a society with such high sounding purposes had a right to expect a more satisfactory explanation why her certificate was reduced from \$5,000 to less than \$2,000. She could not get even that unless she surrendered her certificate for cancellation. Under the stress of circumstances she surrendered it; afterward she discovered, as she believed, that she was entitled to the face of it without deduction. To what extent this case is controlled, if at all, by *Becker v. Berlin Ben. Soc.*, 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. 699, and *Marshall v. Pilots Assn.*, 206 Pa. St. 182, 55 Atl. 916, we cannot, at this stage in the evidence, undertake to determine. The order, however, now sets up a bar to her claim, which in substance is a plea of "accord and satisfaction," in that she surrendered her certificate for cancellation. We have no hesitation in holding that her relation with the order entitled her to the fullest explanation of the reason for its refusal to pay the certificate. She was not dealing at arms'-length with a corporation, but seeking payment for the amount of a meritorious claim. Of the extent of her claim and the justice of her demand the fraternal order had in its exclusive possession full and exact knowledge, but it communicated no item of that knowledge to ²⁶⁶ her; her certificate was, in effect, extorted from her by the curt reply, "Take that or nothing." She put in the order's possession the sole evidence of her claim. Her suit at law must be based upon that certificate, yet the order persists in retaining possession of it.

True, she might declare upon it as a lost instrument one which had been unlawfully obtained from her, secondary evidence of its contents, but there is a much more certain way of obtaining it and the money : her, and that is, by the method she has pursued, call the order at the foot of a bill in equity to produce it, submit to such decree as equity may impose. The demurrer by defendant discloses that it avers the certificate delivered up to be canceled; if canceled, then at law she has to show by the books of defendant that the cancellation was unlawful; the books and documents bearing on this question are all in the possession of defendant; this to her will be a most vexatious and inconvenient burden and ought not to be imposed upon her.

Consider the pleadings of record: She claims \$5,000 for her certificate; defendant answers by averring the resolution of August 1, 1900, of the supreme council, that \$2,000 be the highest amount paid on the death of a member. Plaintiff replies that neither she nor her husband is bound by it, as to this certificate, the resolution was adopted eleven and five months after its delivery without the known consent of her husband; that at the date of its delivery her husband paid an assessment as if upon a certificate of membership and continued said payments until his death; that the resolution which it is claimed reduces the amount, even if it is authorized, involves a full examination of the books and records of the order to determine the exact condition of what is called "the emergency fund." We think, taking into view the positions of the parties, even though the order be not technically a trust for the widow, as well as the nature of the inquiry, that the remedy may have to be made into records, the remedy at law would not have been an adequate one, and that a bill in equity is a more appropriate remedy and best adapted to the case. Says Bierbower's Appeal, 107 Pa. St. 14: "Granted that an action of assumpsit would lie, it does not therefore follow that the chancery side of the court has no jurisdiction. Jurisdiction in equity depends not so much on the want of a common-law remedy as upon its inadequacy, and its exercise often rests in the discretion of the court; in other words, the court may take upon itself to say whether the common-law remedy is, under all the circumstances and in view of the conduct of the parties, sufficient for the purpose of complete justice."

terest in a partnership, take the debtor's share of the principal real estate held by him and his partner as tenants in common against the purchaser of the partnership interest. (p. 94)

O. B. Dickinson, for the appellant.

A. L. Smith and George T. Butler, for the appellees.

³³⁶ MESTREZAT, J. At the time of his death in December, 1888, and for several years prior thereto, William Hall and his two sons, Thomas C. Hall and John H. Hall, were engaged in a manufacturing business under the firm name of William Hall & Company, in the township of Upper Darby, Philadelphia county. The firm carried on its business at a plant including the land, buildings and machinery, was owned by William Hall, ³³⁷ and for which he received a monthly rent from the partnership. He died intestate, leaving to survive him Charlotte Hall, his widow, two sons above mentioned and a daughter, Sarah Ann Cundey, intermarried with C. H. Cundey. On April 16, 1889, the widow and daughter with their husband, conveyed by deed their interests in the premises to the two sons as tenants in common who then, as owners of the premises, executed three mortgages thereon, one in favor of the daughter, Sarah Ann Cundey, and two in favor of the widow, Charlotte Hall. The deed and mortgages covered the land, buildings and machinery. The firm having been dissolved by the death of William Hall, the two sons wound up the business. After they had purchased the interest of their father and sister in the plant, they "opened the books of the firm of William Hall & Company, composed of the two brothers, Thomas C. and John H. Hall, and they took the real estate into their business, subject to those mortgages, and carried on their books as firm property." The firm used the premises in the shoddy manufacturing business without paying taxes but paid the insurance, taxes and whatever interest was due on the mortgages, as well as part of the principal of the first mortgage. The real estate was never conveyed to the partnership nor was the partnership ever made a matter of public record. After John H. Hall and his brother had become owners of the manufacturing plant, several judgments were rendered against him individually, on one of which his interest in the firm of William Hall & Company, was sold January 4, 1895, and purchased by James A. McCullough, the appellant. Sarah Ann Cundey died in 1895, and her administrator issued a writ of *facias* on the mortgage held by her against Thomas C.

and John H. Hall and, having obtained a judgment thereon, sold the real estate on a *levari facias*, on June 7, 1902, for thirty thousand four hundred dollars.

The controversy here arises over the distribution of this fund. The sheriff reported a schedule of distribution as provided by the act of June 4, 1901, Public Laws, 357, to which exceptions were filed. An auditor was then appointed by the court to pass on the exceptions and to make distribution of the fund. The claimants before him were "the holders of the three mortgages, the individual judgment creditors of John H. Hall, the ³³⁸ purchaser of the interest of John H. Hall in the firm of William Hall & Company, and Thomas C. Hall, the other member of the firm against whom no other liens had been entered." The auditor awarded payment in full of the three mortgages and directed the balance of the fund to be divided equally between Thomas C. Hall and Edward W. Perrott, who held the first lien against John H. Hall individually.

This appeal was taken by James A. McCullough, who purchased the interest of John H. Hall in the firm of William Hall & Company sold by the sheriff on the judgment of Edward W. Perrott. The appellant claims that the manufacturing plant was the property of the firm, "was absolutely necessary to the partnership, and was openly and notoriously occupied by the firm and used for partnership purposes as firm property." It is, therefore, contended that as the firm had no creditors the proceeds of the sale of the plant, after the payment of the mortgages, should have been awarded to William Hall & Company or to Thomas C. Hall as liquidating partner of the firm, and not to the members of the firm as individuals or to their judgment creditors. It was further contended that as against James A. McCullough, the appellant, Edward W. Perrott was not entitled to claim any part of the proceeds of the sale of this property on his judgment against John H. Hall, for the reason that Perrott had sold Hall's interest in the firm on his judgment and McCullough had purchased it.

The manufacturing plant, including the land, mill, machinery and houses, was acquired, as we have seen, by Thomas C. Hall and John H. Hall partly by descent from their father and partly by deed as tenants in common from their mother and sister. This title was never changed of record, but the property was held by the owners as tenants in common until the sale was made on a *scire facias* issued on one of the mortgages.

There was nothing of record to show that the plan part of it was held or used as partnership property. the record disclosed as to the title to the property Thomas C. Hall and John H. Hall owned it as tenants mon. Such, briefly, are the conceded facts as to the ownership of this property.

For seventy years, and in an unbroken line of decisions have adhered to the rule announced in *Hale v. E Watts*, 143, 27 Am. Dec. 289, that in order to affect or possession of land it is not competent to show by deed to two persons as tenants in common was purchased and paid for by them as partners and was partnership property. Purchasers and creditors alike may rely upon the title estate as shown by the record, and having done so they not permit their rights acquired on the faith of the thus disclosed to be defeated by parol evidence. When take title to land as tenants in common and place it upon the act, so far as it may affect purchasers and creditors notice, must be considered as a declaration by the owners of the character in which they intend to hold the property. Creditors of a partnership composed of the individuals who hold the title cannot, therefore, enforce payment of their debt out of the property as against the individual creditors of the partners. The latter are entitled to have their claims satisfied out of the proceeds of the property. Such is the settled law of the commonwealth.

In *Ridgway, Budd & Co.'s Appeal*, 15 Pa. St. 177, 18 Dec. 586, the court, by Rogers, J., says: "To affect title or possession of land, it is not competent to show by parol that real estate conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property. This is firmly settled in the cases cited, and in other cases which it is unnecessary to quote. Here there can be no doubt the property was held as a tenancy in common, and as nothing was put on record, manifesting the intention of the partners to regard it otherwise, it must be treated as a separate estate, and of course liable as such to their creditors. In all such cases, parol testimony is totally disregarded and the title is certainly determined in a long train of decisions," says Rogers, J., in *Ebbert's Appeal*, 70 Pa. St. 79, "that as to purchasers and creditors having liens on it, a deed to two persons who are in fact partners, but who take the title to the land as tenants in common, must stand as the foundation of

however, do not sustain the appellant's contention. Appeal, 39 Pa. St. 535, 80 Am. Dec. 542, Meyers, partners of the firm of Imhoff & Meyers, paid the money with partnership funds and took the title in their own name. It was used as partnership property, and when sold by the sheriff, the proceeds were awarded to the partnership against the firm in preference to a judgment against Imhoff, the other partner. But Judge Strong in this case recognizes the doctrine of the cases we have cited and distinguishes this case as follows: "Had the title been taken by both Imhoff and Meyers, without any assertion that it was treated by them as partnership property, ruling in *Hale v. Henrie*, 2 Watts, 143, 27 Am. Dec. 341, several subsequent cases, they would have been but common." The contest in *Abbott's Appeal*, 50 Pa. St. 106, was between partners themselves and did not relate to purchasers or creditors, as is shown by *Agnew, J.*, in *Agnew's Appeal*, 70 Pa. St. 79, and as is recognized by *Clark v. Shafer's Appeal*, 106 Pa. St. 49. Hence that case has no application to the facts here. It is unquestioned that as between partners themselves real estate purchased with partnership funds, and for partnership purposes is partnership property, and it may be shown to be such, notwithstanding the deed was made to the individuals composing the partnership as tenants in common. But that rule cannot be invoked to defeat the claims made on this fund by the lien of John H. Hall.

We do not agree with the appellant's contention that the sale of John H. Hall's interest in the partnership on the judgment of E. W. Perrott estops the latter from claiming the benefit of the judgment or the balance due thereon out of his interest in the proceeds of the sale of the real estate. The appellant's interest in the real estate which, as against that judgment, was not firm assets and did not pass by the sale of his interest in the partnership. Hence, the appellant as purchaser of the partnership interest did not acquire any interest in the real estate or the proceeds resulting from the sale of it. Perrott is now claiming Hall's interest in the partnership sold on the judgment and purchased by the appellant, but is seeking to enforce his judgment against his debtor's interest in the proceeds of the real estate on which it is a first lien and which was an asset of the firm of William Hall & Company.

affirmed.

Partnership Real Estate is discussed in the monographic note to *Golthwaite v. Janney*, 48 Am. St. Rep. 62-77; *Freeman on Cotenancy*, and *Partition* secs. 111-120; *Adams v. Church*, 42 Or. 270, 70 Pac. 1037, 59 L. E. 'A. 782, 95 Am. St. Rep. 740, and cases cited in the cross-reference note thereto.

The Law Protects Purchasers of Real Property as the title appears of record, unless there is notice of something to the contrary: *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250, and cases cited in the cross-reference note thereto. For the application of this rule to property appearing of record as owned by tenants in common: See *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004.

CASES
IN THE
SUPREME COURT
OF
UTAH

CHRISTIENSON v. RIO GRANDE WESTERN R.
COMPANY.

[27 Utah, 132, 74 Pac. 876.]

MASTER AND SERVANT—Assumption of Risks.—ordinary intelligence engaging in an employment obvious, knows the manner in which it is to be carried on and thereto, being familiar with the conditions and surroundings, aware that his own work and that of his fellow-workmen constantly change its character, rendering it alternately safe and dangerous, he assumes the risks incident to the employment. (1)

MASTER AND SERVANT—Assumption of Risks.—experienced employé of ordinary intelligence at work on a job voluntarily selects a place to stand that is obviously dangerous, being familiar with the bank, its conditions and surroundings, aware of the materials of which it is composed, knowing that it is undermined at the particular place where he is working, and that the bank might cave and fall at any moment, he assumes the risk of injury therefrom and cannot recover therefor, especially if he had worked at the bank in the same capacity on numerous occasions, and was as familiar with it, its condition, and the manner in which operations were carried on as his employer. (p.)

MASTER AND SERVANT—Assumption of Risks.—Employer may carry on his business in any way he may choose, and another method would be less dangerous, and if his employee is aware of the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he assumes the risk of injury by the more dangerous method. (p. 950.)

MASTER AND SERVANT—Assumption of Risks.—Employer who engages in any service, and consents to the manner in which it is performed, aware of the conditions and the dangers incident to the employment, and voluntarily undertaking to perform the service at the place of injury, assumes the ordinary risk of injury. (p. 951.)

MASTER AND SERVANT—Assumption of Risks—Safe Place to Work.—If a servant assents to occupy the place assigned him in which to work, and incur all the dangers incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the master's duty to furnish the servant with a safe place in which to work. (pp. 951, 952.)

Sutherland, Van Cott & Allison and S. R. Thurman, for the appellant.

M. Sommer and D. S. Truman, for the respondent.

133 BARTCH, J. The plaintiff brought this action to recover damages for personal injuries, which he alleges he received through the negligence of the defendant. From the evidence it appears, substantially, that the plaintiff is forty-three years of age, and for many years prior to and at the time of the accident which caused his injuries was in the employ of the defendant as a section-hand. When he received his injuries, which was on January 29, 1901, he was working at a gravel bank at Santaquin, on the defendant's line of railway, shoveling gravel into a car provided by the company for that purpose. He had worked there in that capacity at different times since the year 1892. The bank was about twelve or fifteen feet high, and contained different layers of dirt, cement and gravel. At the place where he was working, where the accident happened, the thickness of the gravel, from the bottom of the bank to the cement, was about six feet; the cement was about two feet, and the dirt or ground on top of the cement about four feet thick, making the bank about twelve feet high at that point. The method employed to get the gravel down was to undermine the bank with pick and shovel, and then break it down from the top when it did not fall of its own weight. At the time of the accident the bank had been undermined about two feet, and was top-heavy, and broke away and fell of its own accord, causing the injuries of which complaint is made. The plaintiff was familiar with the method of loosening the gravel, and had on previous occasions, with other fellow-workmen, undermined the bank for the same purpose. He was familiar with the bank; knew the material ¹³⁴ of which it was composed; was aware, while working there before and when the accident occurred, that the bank was undermined, that it was dangerous and might fall at any minute, and that either himself or his fellow-workmen, or both, had undermined it. He was a man of experience in that business, of ordinary intelligence, and entirely familiar

with all the surrounding conditions. At the time of he was shoveling gravel upon the car at a place of election. He worked there in November and December then went to Ogden for several weeks, and when he resumed work at the gravel bank.

Respecting these matters, the plaintiff himself, as things, testified: "During the time that we were working we undermined the bank some right along, and I did as the rest. It was undermined in places, and the bank cave down, first at one place, then at another, and so at one time or another during the work it was undermined the way along from one end to the other. The men were undermining, and I was one of them, the pick being the thing used for this purpose. We undermined it in order to remove the support. There were places at the upper end of the bank where the bank would be likely to fall if it stood perpendicular out being undermined, the gravel being so loose that it would not hold its own weight up, but at the point where the bank would not fall if it stood perpendicular. I knew, and, when I started to undermine it, I did so in order for it to fall at some time or another; I knew that the more I undermined it the more likely the bank would fall. . . . Whenever the track was close up to the bank, we would go to the top of the bank and start to pick from the top, and throw it down. We would pick down through the cement, and get down to the gravel. I did a good deal of this myself, so that I knew pretty well the kind of material of which the bank was composed. I also knew the kind of material of which the bank was composed at the time it was hurt, and also knew it at the time I was working in November 1903 and December." Speaking of what he did just prior to the accident, the witness said: "He didn't tell us how to load the car, nor how to do our work where to station ourselves. We went down to the car, picked up our shovels, and selected our own places; Searles being on one side of the car and the rest of the men on the other in number, on the other. I was attending to my work, picking down shoveling. I did watch the bank, however, to see if it should be anything to indicate a fall. I didn't think of its falling, but I wanted to be on the lookout. When the bank is undermined, you cannot tell but that it may fall and I appreciated this. Somebody had told me that when the bank was undermined it might fall any minute. Of course

the first time I had ever worked it. I would occasionally take a look at the bank to see if there were any signs of falling, so as to be prepared to run and get out of the way if it started to come. I fully appreciated that there was some danger that it might fall, and I wanted to be ready to run if it did. I didn't have any idea that it would fall."

The witness Gurley, who was at work with the plaintiff when the accident occurred, among other things, testified: "When I went to work here after dinner, it was on the same side of the car as Mr. Christenson and Mr. Searles. We all went down together, our tools being already there, for we had left them when we went to dinner. When we walked down there, we selected our places to go to work, and I think Mr. Christenson selected his. Seven of us went there and distributed ourselves around the place as we pleased. As I stood there I saw the bank, and it looked dangerous to me, because I thought it was undermined too far. It was undermined from two to three feet. I watched it pretty closely while I was working there, for I expected the bank to fall in, so that if it started to fall I was going to run. When it did fall it was for a distance of about thirty feet along the face of the bank. ¹³⁶ It didn't fall up to where I was, but pretty close to me. Searles ran and got out of the way. . . . The conditions there on the bank were plain to be seen. Anybody could look at it and see that it was undermined, and that the bank up here had no direct support under it. Anyone could see this who stood there and looked at the bank. I looked at the bank, and saw that it was dangerous, and concluded to stay there, and work and watch it, and take my chances. Mr. Christenson, being right by my side, could see the danger just as I did. Everything that led me to conclude that it was dangerous was open, obvious, and plain to be seen with the eye. Anybody could see it." Testimony to the same effect was given by other witnesses. When the plaintiff rested, the defendant interposed a motion for a nonsuit, which was denied; and, the defendant offering no evidence, the case was submitted to the jury, whereupon a verdict was returned in favor of the plaintiff for the sum of four thousand dollars. Thereafter, the plaintiff having consented, at the instance of the court to a reduction of the amount of the verdict to three thousand dollars, judgment was entered accordingly, and the defendant appealed.

The appellant, in the first instance, insists that erred in denying the defendant's motion for a non motion was based, *inter alia*, on the ground that th in entering upon the performance of the labor in wh engaged at the time of the accident, assumed the r. injuries he sustained. It is urged that the undern consequent falling of the bank was a part of the en and that the company, under the circumstances, was for injuries received by the employé from the fall. The respondent contends that the company was bound the plaintiff a safe place to work, that he did not assum of the caving of the bank, and that the assumption risk was not a question of law for the court, but o for the jury.

We think, under the evidence in this case, the mo nonsuit was well taken, and that the contention of the ent is not tenable. The plaintiff has failed to show his guilty of actionable negligence. He himself had full l of the premises, and was cognizant of the methods em the service, and of the conditions existing there. Thi ifest from the evidence. It is true, the general rul where a master employs a servant, he must exercise care to furnish the servant a reasonably safe place in perform the service, and a failure to do so will re master liable for any injury the servant may receive b such failure; but such rule has no application to a cas one disclosed by the facts and circumstances in evidenc where the very nature of the service is dangerous, and dangerous character is obvious and is equally within th edge of the servant and the master, and is comprehende servant. Where one engages in an employment obvioerous, and knows the manner in which it is to be carri familiar with the conditions and surroundings, and that his own work and that of his fellow-workmen vstantly change its character, rendering it alternately dangerous, he assumes the risks incident to the emp. This case clearly falls within such rule. The evidenc that the gravel bank at the place where the accident h was at that time obviously dangerous; that plaintiff that particular place, where he was at work at the tim injury, of his own choice; that he was familiar with th its conditions and surroundings, and acquainted with t

acter of the materials of which it was composed; that he knew the bank was undermined at that particular place where he was working; that he observed the bank, and realized that he was at a dangerous place; that he was aware that the ¹³⁸ bank might cave and fall at any moment; that he had worked at the bank in the same capacity on numerous previous occasions, and was as familiar with it and the manner in which these operations were carried on as his employer, if not more so; that he was aware that his own work and that of his colaborers rendered the bank dangerous, and of a character continually changing; and that he is a man of experience in that business and of ordinary intelligence. Where such facts as these are established by the evidence, no court can hold the employer liable for injuries sustained by the employé. Nor, under the conditions shown to have existed at that bank, can an employer be required to keep the place absolutely safe. To so require would be an interference with a usual mode of conducting a private business, which mode, although dangerous, is not of such a character that the employé cannot avoid injury by the exercise of ordinary care and prudence. Such an interference with a private enterprise would be contrary to the well-settled law that an employer may carry on his business in the way he may choose, although another method would be less dangerous, and, if the employé knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he assumes the risks of the more dangerous method. In this case a part of the business was to undermine the bank for the purpose of removing its support so as to cause the gravel to break away and fall down. The breaking away and falling of the gravel was simply the result of natural laws, and the plaintiff, as well as his associates, knew or ought to have known just as much about the hazards connected with such business, and about such manner of conducting it, as did the foreman or the employer. The employer, in the conduct of the operations, simply took advantage of the laws of gravitation, with which the plaintiff, being a man of usual intelligence, must be presumed to have been cognizant. He, having engaged in such service, and consented to the manner in which ¹³⁹ it was performed, aware of the conditions of the bank and the dangers incident to the employment, and having of his own volition undertaken to perform the service at the place of injury, must be held to have assumed the ordinary risks of injury incident

right of action against the master resulting from such risk." Likewise, in *Sullivan v. India M. Co.*, 113 *Mass.* 396, the law was thus stated: "When the servant assents to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected": *Pederson v. City of Rushford*, 41 *Minn.* 289, 42 *N. W.* 1063; *Rasmussen v. Chicago etc. Ry. Co.*, 65 *Iowa*, 236, 21 *N. W.* 583; *Reiter v. Winona etc. Ry. Co.*, 72 *Minn.* 225, 75 *N. W.* 219; *Regan v. Palo*, 62 *N. J. L.* 30, 41 *Atl.* 364; *Songstad v. Burlington etc. Ry. Co.*, 5 *Dak.* 517, 41 *N. W.* 755; *Swanson v. City of Lafayette*, 134 *Ind.* 625, 33 *N. E.* 1033; *Galveston etc. Ry. Co. v. Lempe*, 59 *Tex.* 19; *Olson v. McMullen*, 34 *Minn.* 94, 24 *N. W.* 318; *Larich v. Moies* 18 *R. I.* 513, 28 *Atl.* 661; *Anderson v. Daly Min. Co.*, 16 *Utah*, 28, 50 *Pac.* 815; *Cisney v. Pennsylvania etc. Co.*, 199 *Pa. St.* 519, 49 *Atl.* 309; *Anderson v. Winston (C. C.)*, 31 *Fed.* ¹⁴¹ 528; *Gulf etc. Ry. Co. v. Jackson*, 65 *Fed.* 48, 12 *C. C. A.* 507; *City of Minneapolis v. Lundin*, 58 *Fed.* 525, 7 *C. C. A.* 344.

The appellant has cited *Allen v. Logan City*, 10 *Utah*, 279, 37 *Pac.* 496, in support of its contention in this case. But we do not base our decision herein upon that case. There the plaintiff was summoned under the law to work out his poll tax, and, obeying the summons, placed himself in the hands of an officer of the defendant who had charge of the work, willing to obey his directions. He had worked at that bank but two half days, when, on the day of the accident, the defendant assigned him to a dangerous position, where he had not been accustomed to work, and failed to inform him of the existence of cracks on top of the bank, which had been occasioned by the explosion of giant powder by other laborers on the previous day, and which could not be observed from the place of work, and of the existence of which, as well as of the blasting, the plaintiff was in total ignorance, but the defendant was aware of the same. While the plaintiff was at work, ignorant of the condition of the bank on top, and which condition was not open to his view, the

bank broke away along the cracks, fell, and injured 1 are of the opinion that to hold that, under such circumstances, those, he could not recover, was extending the doctrine of assumed risks too far, and therefore refrain from recognizing the decision as controlling authority herein.

The conclusion, under the facts and circumstances in this case, is irresistible that the motion for a nonsuit to have been sustained. It seems the judge before whom the case was tried, and who heard and observed the witnesses stand, had been forced to the same conviction, when, in giving his opinion on the motion, he said: "Personally, I regard this as an accident, pure and simple, for which nobody was responsible." We do not deem it important to pass upon the question presented.

The case must be reversed, with costs, and the case remanded, with directions to the court below to set aside its judgment, and enter judgment on the motion for nonsuit in accordance with this opinion. It is so ordered.

Baskin, C. J., and McCarty, J., concur.

The Doctrine of Assumption of Risks is discussed in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 314-321; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 814-821; *Coal Co. v. Smith*, 87 Am. St. Rep. 573-584. And see the note of *McMillan v. North Star Min. Co.*, 32 Wash. 579, 98 Am. 908, 73 Pac. 685; *Grant v. Keystone Lumber Co.*, 119 Wis. 408, 83 Am. St. Rep. 883, 96 N. W. 535. For the application of the doctrine to cases where banks cave in on workmen, see *Western St. Muscial*, 196 Ill. 882, 89 Am. St. Rep. 325, 63 N. E. 664; *Electric Ry. Co.*, 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 2d 1.

NASH v. CLARK.

[27 Utah, 158, 75 Pac. 371.]

EMINENT DOMAIN—Public Use.—Constitutional provision that private property shall not be taken for public use without compensation, means that private property cannot be taken for a private use. (p. 956.)

EMINENT DOMAIN—Public Use.—Property is taken for public use, when the taking is for a use that will promote the interests and will tend to develop the natural resources of the state. (p. 957.)

EMINENT DOMAIN—Public Use—Irrigation.—The owner of an arid farm may, under the exercise of the right of eminent domain, condemn a right of way through the ditch of another, for the

of carrying water to his land for irrigation purposes. Such taking is for a public use. (p. 959.)

EMINENT DOMAIN—Public Use.—Irrigation of lands is for a public purpose, and water thus used is put to a public use. (p. 961.)

J. W. N. Whitecotton, for the appellants.

Warner, Hentz, Prentiss & Warner, for the respondent.

¹⁵⁹ McCARTY, J. Plaintiff brought this action to condemn a right of way in a ditch owned by the defendants. The provisions of the statute upon which he bases his right of action, so far as material to this case, are as follows: Revised Statutes of 1898, section 3588, in part provides: "Subject to the provisions of this chapter the right of eminent domain may be exercised in behalf of the following public uses: . . . 5. Reservoirs, dams, and water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable. 6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters or other works for the reduction of ores, or from mines; mill dams; . . . also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter. . . . 10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat." Section 1277 of the Revised Statutes of 1898 is as follows: "Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, ¹⁶⁰ but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the prac-

tical use of any other right of way, highway, or public road, nor to unnecessarily injure any public property. Such right may be acquired in the manner by law for the taking of private property for public use.

Section 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other purpose, and there is a canal or ditch already constructed which can be enlarged to convey the required quantity of water, such person or corporation, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge said canal or ditch already constructed by paying the owner of the canal or ditch to be enlarged the amount of damage, if any, caused by said enlargement; provided said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

The complaint herein in substance alleges that plaintiff is the owner of eighty acres of land situated in Utah county, Utah, which land, without irrigation, is arid, barren and unproductive, but with irrigation would produce in abundance hay, grain and other agricultural crops; that Fort Canyon is a natural stream of water in Utah county, flowing from the mountains north of plaintiff's land in a southerly direction to and near plaintiff's land, that the defendants own a certain tract of land contiguous to and adjoining plaintiff's land to the north, and are also the owners of a certain ditch leading from Fort Canyon creek over and across their land to a point about one hundred feet of plaintiff's land, which ditch is about a quarter of a mile in length, eighteen inches wide, and twelve inches deep; that plaintiff owns water in Fort Canyon creek and desires to irrigate his land above mentioned; that there is no convenient or practicable way in which to divert the water of said creek and convey the same onto plaintiff's land except by and through the ditch of defendants; that, in order to irrigate his land, it is necessary that plaintiff have a right to enter defendants' ditch; that for plaintiff to enter defendants' land to enlarge their ditch will not injure the land of plaintiff requested of defendants that they allow him to enter their land and enlarge their ditch, and use it for conveying his water to and on his land, and offered to contribute his share of the expense of maintaining the ditch and all damages caused by the defendants refused to permit him to do so.

Plaintiff asks that he be permitted to enlarge defendants' ditch to the extent of widening it one foot more; that he have a perpetual right of way through said ditch when so widened and constructed for the purpose of diverting and carrying his water from Fort Canyon creek to his land for irrigation purposes; that the damages for such right of way and use of the ditch by plaintiff be fixed and determined, and that upon payment by the plaintiff of such damages he have such ditch condemned to the extent of and to the use and for the purposes above set forth, and that defendants be enjoined from in any way or manner asserting any right antagonistic to this right of plaintiff; that if plaintiff is permitted by decree of this court to enlarge and use the ditch as aforesaid, his land can be made productive and the use of the water to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose. Defendants interposed a general demurrer to plaintiff's complaint, alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants elected to stand upon their demurrer, and the plaintiff introduced evidence in support of the allegations of his complaint, and the court entered judgment and decree in favor of plaintiff, condemning defendants' land as prayed for in the ¹⁶² complaint; and for a reversal of this judgment the defendants have appealed to this court.

Appellants contend that the order of the district court overruling the demurrer was erroneous for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use. Both the constitution of the United States and the constitution of this state provide that "private property shall not be taken or damaged for public use without just compensation." This provision is construed to mean that private property cannot be taken for strictly a private use, which counsel for respondent concede to be the true and proper construction. This brings us to the only question presented by this appeal, to wit: Was the condemnation of appellants' land in this case in law and in fact for a public use? There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempt to lay down any fixed rule as a guide to be followed in

all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agent; that is, the public must have the right to the actual use of some way of the property appropriated; whereas the other class of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the general natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in line with enlightened public policy and that the liberal interpretation given the term "public use" which the legislature has in effect, declared shall be followed in this state is more conducive to individual and public advancement than the strict construction adopted and followed by the line of decisions first referred to.

The question of the manner of appropriation and use of water for domestic, irrigation, mining and manufacturing purposes is, and ever since the advent of the early pioneers has been, the most important and vital of all industrial questions with which the people within this arid region have been confronted. Their requirements, and, we might add, their absolute necessities, impelled the legislatures and courts at an early date in the history of the states and territories strictly to the character to depart from and lay aside as impracticable the legal doctrines and rules relating to the control and use of water which had theretofore been adhered to and followed for ages, and to adopt and put in operation a new system of appropriating title in and to the streams which are within the arid region, the use of which was found to be indispensable in agricultural pursuits, in mining, in the establishment of industries, in the general development of the arid states and territories. In an examination of the records of the early cases in this territory (then territory) wherein the court declined to follow the common-law doctrine of riparian rights in its entirety, the same arguments were advanced by those claiming title to water under and by virtue of this doctrine as were advanced by appellants in this case, to wit, that fundamental rights were being interfered with, and the property of one citizen was being taken and given to another. We very much doubt whether either advocate or layman, who has witnessed the magnificent results wrought by the change, would now contend that the constitution was overridden, or any natural

legal right of the citizens invaded and their property confiscated, when the common-law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating ¹⁶⁴ and acquiring title to water adopted that made it possible for populous and flourishing commonwealths to grow up where the country otherwise would have remained a desert, uninhabited, with the possible exception perhaps of an occasional cattle or sheep ranch. The question of how to increase the water supply in the arid region has steadily grown in magnitude and importance until it has become national as well as local. Congress realizing the great public necessity for an increased water supply, and appreciating the great possibilities that may be accomplished in this and other states and territories within the arid belt by conserving and storing the high and surplus waters caused by the melting snows which in the spring months come down from the mountains in torrents, and are either wasted in the deserts or find their way into box canyons, where they can never be made available for irrigation or other useful purposes, by a provision in the enabling act (section 12) granted to this state five hundred thousand acres of public lands lying within the state, with which to create a fund to be used for the purpose of building reservoirs; and later on, by an act known as the "irrigation bill," created a fund from the public revenues, which is swelling into the millions of dollars, for the purpose of aiding in this most important of all enterprises of a public character in the arid west, and upon the success of which its future growth and prosperity largely depends. The large expenditure of public funds in this direction is not to be made for the purpose of enabling the states and territories directly benefited thereby, in their sovereign capacity, to engage in farming and other lines of industry, which are dependent upon the water supply, but to ultimately enable the citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds. These questions, which are the most important with which the arid states and territories have had to deal, and the successive steps that have been taken in ¹⁶⁵ advancing our system of irrigation, are referred to for the purpose of showing the interest that the public have always had and must of necessity continue to have in the question of irrigation. The natural physical conditions of this state are such that in the great majority of

394, the plaintiff sought to condemn a right of way over certain lands to a mining claim owned by plaintiff, to be used for the purpose of transporting wood, lumber, timbers and other material to enable it to conduct and carry on its business of mining. The claim was made in that case, as it is in this that the statute under which the action was brought was unconstitutional for the same reasons as are urged in the case before us. Mr. Chief Justice Hawley, speaking for the court, says: "That mining is the paramount interest of the state is not questioned. That anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition. Hence, it necessarily follows that, if the position contended for by the petitioner is correct—and I believe it is—then the act is constitutional, and should be upheld. Although other and weaker reasons have been more frequently assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given. . . . Now, it happens, or at least is liable to happen, that individuals, by receiving the title ¹⁶⁷ to barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation. . . . to greatly embarrass, if not entirely defeat, the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this state many of the advantages which other states possess, but by way of compensation to the citizens has placed at her doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future development unobstructed by the obstinate action of any individual or individuals." In the case of *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376, practically the same question was involved as is presented here, and the supreme court of Arizona, in an elaborate and exhaustive opinion, in which many cases are cited and reviewed, held that the use of water for irrigation is a public use,

and that an act of the Arizona legislature, providing for the condemnation of lands for canal purposes, was constitutional: *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100. In the case of *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369, the court, in the course of the opinion, says: "On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. . . . To irrigate, and thus to bring into possible cultivation these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the land owners, ¹⁰⁸ or even to any one section of the state. The fact that the use of the water is limited to the land owner is not, therefore, a fatal objection to this legislation." In conclusion the court on this point further says: "We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use": *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757. There are many other well-considered cases which declare the same general doctrine as those referred to, but we deem it unnecessary to make further citations.

The judgment of the district court is affirmed; the costs of this appeal to be taxed against the appellants.

Bartch, J., concurs.

Baskin, C. J., dissents.

As to What is a Public Use within the meaning of the law of eminent domain, see the recent cases of *Fallsburg etc. Mfg. Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681; *Gaylords v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522; monographic note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 687-707. And as to whether property may be taken, under the power of eminent domain, for the purpose of furthering irrigation or drainage, see *In re Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755; *Parton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 843, 29 L. R. A. 853; *Matter of Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303, 49 L. R. A. 781.

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COLE v. RICHARDS IRRIGATION COMPANY.

[27 Utah, 205, 75 Pac. 376.]

WATERS—Rights of Appropriators.—If the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted to the source from which the supply is obtained and any interference with the stream by a person having no interest therein, to the damage of the appropriator, is unlawful and actionable. (p. 965.)

WATERS—Unlawful Interference with.—A Constitutional provision that "all existing rights to the use of any of the waters of this state for any useful or beneficial purpose are hereby recognized and confirmed," puts it beyond the power of any person to lawfully go upon a stream of water in which he has acquired no right, and interfere with existing rights, or to destroy or cut off the source of supply, of such stream, although it consists of a pond or a lake. (p. 965.)

WATERS—Appropriation—Sources of Supply.—If lakes form a part of the source of supply of a creek, and with the exception of one of such lakes form a part of the natural channel of one of the tributaries of such creek, prior appropriators of the waters of the creek are entitled to the same usufructuary rights to the waters which naturally flow and collect in such lakes, and which eventually find their way into the main channel, as they have to the balance of the natural flow of the creek. (pp. 965, 966.)

J. M. Thomas and Pierce, Critchlow & Barrette, for the appellants.

Sutherland, Van Cott & Allison, for the respondents.

206 McCARTY, J. This is an action to quiet title to six reservoir sites and to all surplus waters that flow into said sites from the country surrounding them, and to restrain defendants from interfering with any of the reservoirs and reservoir sites, dams, headgates, or other improvements thereon, or from appropriating to their own use any of the waters stored or to be stored therein. Four of these reservoir sites are situated within the watershed and near the headwaters of Little Cottonwood Canyon, and the other two reservoir sites are situated lower down, and on the main channel of Little Cottonwood creek. The complaint contained three causes of action. The first and second causes of action were to recover damages from defendants for their alleged wrongful interference with some of the reservoir sites, and the alleged appropriation of the waters stored therein; and the third cause of action to quiet plaintiffs' title to the several sites and to all surplus waters flowing therein, and to enjoin defendants from interfering with plaintiff's rights to

propriated waters that flow therein, but deny their right to lower the outlets and drain the lakes of water which the ²⁰⁸ plaintiffs have not held back and stored by means of their artificial embankments; whereas the plaintiffs claim the right to not only draw off the surplus waters stored by them, but to cut down the natural barriers at the outlets, and drain the lakes of the water which nature has stored therein. This appears to be about the only material controverted question involved in the case, as the evidence shows that the Alta and Gadd Valley reservoirs are uncompleted, and in no condition to hold water.

A. F. Doremus, the state engineer, was called as a witness, and testified that he made an examination of the lakes in 1901, and found that Red Pine No. 1 is formed by a natural barrier across the bed of the canyon, composed of large cubes of granite, earth and gravel. Through this barrier the plaintiffs had cut a channel from seven to eight feet in depth in which a culvert had been built. "Above this lake, and in the same neighborhood, were three others. The only overflow that was apparent was from the lower lake. From the second lake you could hear the water running, but you could not see a continuous stream. You could see it in places between the spaces in the rocks. It escaped from this barrier, and discharged into the other lake. This, in a general way, describes the situation. As to the artificial work done on Red Pine No. 1, my opinion is that it is not capable of storing water to any greater extent than the natural barrier would have done. In the first place, it was not much, if any, higher. In the second place, it was not constructed in a manner that would hold water as well as the natural barrier. It would be like substituting a leaky barrel for a tight barrel. It is not calculated to hold water. There was a small overflow at Red Pine No. 1." The record shows that practically the same conditions existed at the other lakes. It will thus be observed that the work done on the several reservoirs was not of a character to increase their capacity for holding water. Therefore, the only change made by plaintiffs affecting the volume of water in ²⁰⁹ Little Cottonwood creek was to drain the lakes in a few days by drawing therefrom large quantities of water, which from time immemorial had gradually, during the hot summer months, when most needed, found its way into the main channel of the creek. The effect of the course thus pursued by plaintiffs was to diminish, rather than increase, the supply of water in this creek. The court found the issues in favor of the defendants, and plaintiffs appealed.

It is settled in this arid region by abundant authority when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the appropriator acquires with them an interest in the stream at the points where the waters are diverted from the natural source to the source from which the supply is obtained, and any interference with the stream by a party having no interest that materially deteriorates the water in quantity previously appropriated, to the damage of those entitled to use, is unlawful and actionable: *Kinney on Irrigation*, Bear River & Auburn Water etc. Co. v. New York & N. E. Cal. 327, 68 Am. Dec. 325; *Hill v. King*, 8 Cal. 327, 38 Cal. 327; *Canal etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 143; *Nixon Water Co. v. Fletcher*, 23 Cal. 482; *Natoma Water Co. v. McCoy*, 23 Cal. 491; *Stein Canal Co. v. Kern Island*, 53 Cal. 563; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 274. Section 1, article 17 of the constitution of Utah provides: "all existing rights to the use of any of the waters of the state for any useful or beneficial purpose, are hereby recognized and confirmed." It will thus be observed that the organic law of this state has put it beyond the power of any party to divert water from a stream of water in which he has acquired a right, and interfere with existing rights, or destroy or diminish the source of supply of such stream because it happens to be a pond or lake. It is a matter of common knowledge that the most valuable and permanent sources of water in this state are its numerous lakes, which bodies of water vary in size from a few square rods to several townships in extent, and sections 1265 and 1266 of the Revised Statutes of 1898 recognize the rights that have been acquired by appropriation of the waters of the lakes, as well as other natural sources of supply within the state.

It is conceded that respondents are, and for many years have been the owners of and entitled to the use of all the flow or primary waters of Little Cottonwood creek. In the light of the foregoing principles, the only question for our determination is, Do the natural waters of the lake in consideration form a part of the source of supply of Little Cottonwood creek? If they do, then the judgment of the lower court must be affirmed. The great preponderance of evidence not only shows that the lakes in question form a part of the source of supply of this creek, but, with the exception of the upper lake, they form a part of the natural char-

of its tributaries; hence it necessarily follows that respondents have the same usufructuary rights to the waters which naturally flow and collect in these lakes, which eventually find their way into the main channel, as they have to the balance of the natural flow of the creek: *Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 411, 18 Pac. 52. While it is the policy of the state to encourage enterprises which tend to increase the available supply of water in the state, yet parties engaged in these laudable undertakings must respect the vested rights of others to the streams and other sources of water supply throughout the state accrued to them by prior appropriation.

The judgment is affirmed; the costs of this appeal to be taxed against appellants.

Baskin, C. J., and Barch, J., concur.

A Prior Appropriator of the Water of a natural stream secures a property right therein: *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258. See, too, *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; *Walsh v. Wallace*, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914. A prior appropriator of water from the main stream is not subject to subsequent appropriation from its tributaries by others: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; *Farmers' etc. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444.

HEAVEY v. COMMERCIAL NATIONAL BANK.

[27 Utah, 222, 75 Pac. 727.]

FORGERY—Negotiable Instruments.—If a bank by mistake informs a person that it holds a deposit of money to his credit, and the addressee requests a draft for the amount, and upon receiving such draft indorses it, receiving the money, his indorsement does not constitute forgery. (p. 969.)

NEGOTIABLE INSTRUMENTS—Negligence of Drawer.—If the drawer of a bill of exchange, draft or check has been induced through fraud to deliver it to an impostor, believing him to be the real person named therein, and such impostor negotiates the instrument, and receives payment thereon from an innocent third person, as between the bona fide holder and drawer, the latter must stand the loss. (p. 970.)

BANKS AND BANKING—Negotiable Instruments—Negligence of Indorsee.—If a bank by mistake informs a person that it holds a certain sum of money on deposit to his credit, and he shows the letter so informing to a third person, and requests from the bank a draft for the amount of the deposit, which, when received he indorses to such third person, who pays him the amount of the deposit, as between such third person and the bank the latter must stand the loss. (p. 970.)

Heywood & McCormick, for the appellant.

Henderson & MacMillan, for the respondent.

McCARTY, J. The transactions and circumstances out of which this action arose are as follows:

On November 10, 1902, one P. M. Cushnahan deposited with defendant bank the sum of three hundred and seventy-five dollars for the credit of one James Malloy. The same day the clerk of defendant bank wrote such information upon a ~~226~~ postal card addressed to James Malloy, Corinne, inclosed such postal card in an envelope, which he by mistake addressed to James Malloy, Denver, Colorado. This card was received by one James Malloy, of Denver, who on November 17th, wrote defendant bank as follows:

"Denver, Colo., Nov. 17, 1902.

"T. D. Ryan, Cashier, Ogden, Utah.

"Dear Sir: Your P. C. of the 10th received. Please send me New York draft for the \$375.00, less your charges.

"JAMES MALLOY.

"2219 Larimer street, Denver, Colo."

Before sending the letter, Malloy showed it to plaintiff herein. Upon receipt of this letter, and believing it came from its depositor, in compliance therewith, defendant bank made out the following draft:

"Commercial National Bank,

"No. 14,601. Ogden, Utah, Nov. 20, 1902.

"Pay to the order of James Malloy, three hundred and seventy-four and sixty one-hundredths (\$374.60) dollars.

"R. T. HUME,

"Cashier.

"To Kountze Bros., Bankers, New York."

This draft was inclosed with the following letter, which was forwarded to the address indicated in Malloy's letter of November 17th, which was plaintiff's place of business:

"Ogden, Utah, Nov. 20, 1902.

"Mr. James Malloy, Denver, Colo., 2219 Larimer St.

"Dear Sir: Complying with yours of the 17th, we inclose New York draft for \$374.60.

"Yours truly.

"T. D. RYAN,

"Cashier.

When the draft arrived in Denver, the letter in which it was inclosed was received by plaintiff and by him handed to James Malloy, whom he ²²⁷ had known for a couple of years. The letter was opened and the draft produced in plaintiff's presence, and thereupon James Malloy requested plaintiff to go with him to the bank and get the money, which plaintiff did. He identified him there as James Malloy, but was requested by the bank to place his (plaintiff's) name upon the back of the draft. This being done, the money was handed to plaintiff, and by him then and there delivered to Malloy. On November 20th James Molloy (the real party for whom the money was deposited) came into the bank, and it was then discovered that a mistake had been made, and the bank imposed upon by the Malloy letter of November 17th. The payment of the draft was immediately stopped in New York and an effort made to stop payment in Denver. When, in due course of business, the draft reached New York payment was refused, and the draft was protested and returned to the Denver bank, which bank thereupon charged the amount of the draft against plaintiff's account. James Malloy, of Denver, disappeared immediately after the draft was cashed by the Denver bank. It appears that the defendant bank was well acquainted with the signature of James Molloy, of Corinne, both from seeing it upon his checks drawn against his deposits in the bank, and also as indorsed upon the back of dividend checks, he being a stockholder of the defendant bank. The account of James Molloy in the bank was carried in the name of James Malloy, but his signature and indorsements were always "James Molloy." The cause was tried by the court sitting without a jury. The court, after hearing the evidence, found the issues in favor of plaintiff, and rendered judgment in his behalf for the amount of the draft and interest thereon. Defendant bank appeals.

Appellant contends that James Malloy, having procured the draft by artifice and fraud, acquired no right ²²⁸ or title to the same, and that his indorsement, which appellant insists was a forgery, could not and did not invest respondent with any legal right to recover on the instrument which Malloy himself did not possess, however innocent and free from blame the respondent may have been in the part he took in the transaction which eventually put him in possession of the draft. The rule contended for by appellant has been held to apply to cases in which the draft or bill has been lost or stolen, and then negotiated upon a forged indorsement, but the facts in this case do not

bring it within that rule. The draft in question was issued by appellant on Malloy's order, in his favor, and he is the man to whom it was sent. True, appellant at the time believed him to be the James Molloy, of Corinne, in whose favor the deposit was made against which the draft was supposed to have been drawn. The fact, however, remains that James Malloy, of Denver, is the man to whom the draft was sent. The record shows that when he negotiated the instrument he made no attempt to impersonate some other person, and he indorsed it by writing his own name on the back thereof without any intention that his signature should be taken for that of any other person. Under these circumstances, whatever crime Malloy may have committed by procuring and negotiating the draft in the manner he did, it is evident that his indorsement of it did not constitute forgery: 2 Bishop's Criminal Law, 583. Even if Malloy's indorsement of the draft were construed to be a forgery, it could not, in the face of the admitted facts in this case, and the great weight of judicial authority, affect the result. While there are a few cases which hold to the contrary, yet the majority of the decisions which we think contain the better reasoning hold that, where a drawer of a check, draft or bill of exchange has been induced, through fraud, to deliver it to an impostor, believing him to be the person named in the check, draft or bill of exchange, and the impostor negotiates the instrument, and receives payment thereon from an innocent ²²⁹ third party, as between the bona fide holder and drawer, the latter must stand the loss: *Land etc. Trust Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420, 50 L. R. A. 75; *United States v. National Ex. Bank (C. C.)*, 45 Fed. 163; *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; *Crippen v. American Nat. Bank*, 51 Mo. App. 508; *Burrows v. Western Union Tel. Co.*, 86 Minn. 490, 91 Am. St. Rep. 380, 90 N. W. 1111, 58 L. R. A. 433; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141.

In this case it appears that appellant was well acquainted with the signature of James Molloy, of Corinne, who was both a depositor and a stockholder of defendant bank, and that his signature is easily distinguished from that of James Malloy, of Denver, Colorado, to whom the draft was sent. Not only is there a marked dissimilarity between the signatures of the two men, but their names are spelled differently. Therefore, it is manifest that, if appellant had exercised ordinary care and prudence at the time it received the order from James Malloy,

of Denver, for the draft, it would not have been possible for him to have perpetrated the fraud and procured the draft. Not only did appellant fail to exercise ordinary business care on this occasion, but accompanied the draft with a letter which was sufficient to enable Malloy to dispel every doubt that the ordinary business man might entertain as to the regularity of the transaction that put him in possession of the instrument. The rule is tersely, and, we think, correctly, stated in the case of *Crippen v. American Nat. Bank*, 51 Mo. App. 508, as follows: "That when both parties to a transaction are innocent, and the loss must fall upon one, it should be upon the one who in law most facilitated the fraud." Appellant, having issued and placed in the hands of an impostor its draft, a negotiable instrument that is accepted and exchanged with almost the same degree of confidence in commercial centers as are national bank notes, ought not to be permitted to repudiate it, and compel respondent, who honestly ²³⁰ and in good faith became an indorser, to stand the loss, which the record shows was made possible by appellant failing to observe the usual and customary business rules followed by banking-houses and other commercial institutions in issuing this class of paper. As was said by the court in the case of *Levy v. Bank of America*, 24 La. Ann. 220, 13 Am. Rep. 124: "The plaintiffs cannot successfully complain that the bank failed to protect them from the devices of a person who had with so little effort deceived and defrauded them. . . . It seems to us that they are endeavoring to make the bank repair a loss which they brought on themselves by their own carelessness." In this case it was not shown, nor is it claimed, that there was any fact or circumstance connected with the transaction by which respondent became the owner of the draft in question that would have justified the slightest suspicion on his part that Malloy obtained it by fraud; but, on the other hand, he knew that Malloy had sent an order for the draft, which, when issued, was forwarded to respondent's place of business, the letter opened in his presence, and the draft produced and shown to him by a man whom he had known for two years. Under these circumstances respondent did no more in identifying Malloy and indorsing the draft than any business man of ordinary prudence would have been justified in doing under the same or similar circumstances.

We are of the opinion, and so hold, that appellant, by its own carelessness having furnished Malloy the means by which he

perpetrated the fraud, ought to stand the loss occasioned thereby.

The judgment is affirmed, with costs.

Baskin, C. J., and Bartch, J., concur.

For Authorities bearing upon the decision in the principal case, see Land Title and Trust Co. v. Northwestern Nat. Bank, 196 Pa. St. 230, 79 Am. St. Rep. 717, 46 Atl. 420, 50 L. R. A. 75; Burrows v. Western Union Tel. Co., 86 Minn. 499, 91 Am. St. Rep. 380, 90 N. W. 1111; First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 58 L. R. A. 433, 94 Am. St. Rep. 637, and monographic note.

BLOCK & GRIFF v. SCHWARTZ.

[27 Utah, 387, 76 Pac. 22.]

CONSTITUTIONAL LAW.—Statutes will not be Declared Void simply because, in the opinion of the court, they are unwise, or opposed to justice and equity. Statutes must in some way violate constitutional provisions in order that they may be declared void. (p. 974.)

CONSTITUTIONAL GUARANTY that No Person Shall be Deprived of life, liberty or property, without due process of law embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political and personal rights, including the right in each subject to purchase, hold, and sell or dispose of his property in the same way that his neighbor may, and of such "liberty" no one can be deprived without due process of law. (p. 976.)

CONSTITUTIONAL LAW.—Liberty to Sell Property.—A statute which deprives an owner of his "liberty" to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business may lawfully do, invades his guaranteed constitutional rights, and cannot be upheld. (p. 977.)

CONSTITUTIONAL LAW.—Exercise of Police Power.—Neither the legislature nor the executive can, under the guise of police regulation, arbitrarily or unjustly, without good cause, restrict or infringe upon the property rights or the liberty of any person within the protection of the constitution, and whenever the legislature undertakes to determine what is a proper exercise of the police power, its determination is a subject of judicial scrutiny. (p. 980.)

CONSTITUTIONAL LAW.—Police Power may be exercised to promote the safety, health, comfort and welfare of society, and to sustain legislation as a proper exercise of such power, it must have reference to some such end. (p. 980.)

CONSTITUTIONAL LAW.—Exercise of Police Power does not justify the enactment of a statute prohibiting solvent merchants from disposing of their stock of goods in bulk without notifying their creditors. (pp. 980, 981.)

CONSTITUTIONAL LAW—Statutes Regulating Sale of Stock of Goods in Bulk.—A statute prohibiting, under a penalty, any merchant, whether solvent or insolvent, from selling or disposing of his stock of goods in bulk, without an inventory thereof, and notification to his creditors, and which applies also to persons acting in a fiduciary capacity and under judicial process, and which does not apply to merchants who are not indebted, is unconstitutional as depriving a solvent merchant of his property and liberty to contract without due process of law, and as being class legislation. (p. 981.)

CONSTITUTIONAL LAW.—Statutes Which Punish Criminally One Person for the doing of an act which another person in the same line of business may lawfully do, are unconstitutional, as being class legislation, and as a deprivation of property and liberty without due process of law. (p. 986.)

Zane & Stringfellow, for the appellant.

W. R. Huthinson, for the respondent.

²⁹⁰ BARTCH, J. This action was originally brought in a justice's court on April 2, 1902, to recover two hundred and seventy-seven dollars and forty-seven cents for merchandise sold and delivered to the defendant ²⁹¹ Schwartz. On the same day, at the instance of the plaintiffs, the goods were attached while in the possession of the intervener, John Mann, to whom Schwartz had previously, on March 29, 1902, sold and delivered the same for the sum of five hundred and fifty dollars, which was its fair value, the purchase having been made in good faith. After the writ of attachment was levied upon the goods the purchaser filed his complaint in intervention, claiming to own all the property included in the levy, and praying that the attachment be dissolved, and the goods restored to his possession, and for damages and costs. Neither the seller nor the purchaser made an inventory of the merchandise before sale, as required by the act approved March 14, 1901 (Utah Sess. Laws, p. 67, c. 67); nor did they in other respects comply with the requirements of that act. The cause was first tried in the justice's court, where judgment was rendered in favor of the intervener, and then appealed to and tried in the district court, where the sale was held fraudulent and void under the statute referred to, and judgment rendered in favor of the plaintiffs. The appeal to this court presents simply the question of the constitutionality of the law relating to the sale of merchandise in bulk, found in that enactment.

The appellant contends that the act is unconstitutional and void, and that, therefore, he cannot be punished for a violation of its provisions. He insists that it is repugnant to and in

conflict with both federal and state constitutions, in that it abridges and interferes with the inherent and inalienable rights which are guaranteed to every subject by both constitutions. The respondent contends that the act is not in conflict with the supreme law, but is the result of a proper exercise, by the legislature, of the police power of the state. In determining the question thus presented it behooves us to be mindful of the fact that the enactment in controversy has, in the judgment of both the legislative and executive branches of the state government, been declared a valid exercise of legislative power. Courts ³⁹² will always approach such a judgment with that consideration and respect which is due to the co-ordinate branches of the government, and if, upon an examination and comparison of the enactment with the constitutional provisions which it is claimed to violate, there is a well-grounded doubt of its validity, such doubt must be resolved in favor of its constitutionality. If, however, notwithstanding the enactment was passed with all due deliberation and formalities, it be found to contravene constitutional provisions, or to constitute an infringement upon the rights of individuals guaranteed by the constitution, then the courts have the conceded power to declare void the enactment, as being a violation of the supreme law of the land. But, although such power is lodged in the courts, they will not declare void a legislative enactment unless there is a substantial conflict between it and the constitution; and so high a regard do the courts entertain for the judgment of the makers of the law that in determining the validity of an enactment every presumption will be indulged in favor of its constitutionality. The question of the validity of a legislative act can alone be determined by reference to the constitutional inhibitions and restraints. Whenever as to any subject within the jurisdiction of the state, the constitutions of the state and of the United States are silent, the legislature may speak; and when it does speak its enactment will not be declared void simply because, in the opinion of the court, it is unwise, or opposed to justice and equity. The sole question in such case is whether the act violates the supreme law of the state or of the United States. If it does, it is the plain duty of the courts to declare its invalidity. The question under consideration must be determined in the light of these principles, which have been frequently asserted by the courts.

Section 1 of the act in controversy reads: "A sale of any portion of a stock of merchandise otherwise than in the ordinary

course of trade, and in the regular and usual prosecution of the seller's business, or a sale of ³⁹³ an entire stock of merchandise in bulk, is fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory, showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith, make full and explicit inquiry of the seller as to the names and places of residence or places of business of each and all of the creditors of the seller, and the amount owing each creditor, and unless the purchaser shall at least five days before the sale, in good faith, notify, or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge or can with the exercise of reasonable diligence acquire knowledge, of said proposed sale, and of the said cost price of the merchandise to be sold and of the price proposed to be paid therefor by the purchaser." Section 2 makes the violation of the provisions of the first section a misdemeanor, and prescribes a penalty thereof. Under the provisions of the act a sale of any portion or all of a stock of merchandise, made out of the ordinary course of trade, by any merchant who has creditors, without a detailed inventory made at least five days before the sale, showing the cost price of each article, and notice of the proposed sale, the cost price, and selling price, given at least five days before the sale to each creditor, is not only fraudulent and void, but also renders both the seller and purchaser guilty of a misdemeanor, and subjects them to the penalty provided in the act for that crime. Not only this, but the merchant, though ever so solvent and able to pay his debts, must, in order to effect a sale of the whole or any portion of his stock out of the usual course of trade, expose the secrets of his business to every person who may seek to buy and to whom he may desire to sell, as well as to every creditor. The making of inventories and giving notices as required by the act, it can ³⁹⁴ readily be seen, would, in many instances, almost absolutely prohibit the consummation of such sales. Such would doubtless be the practical operation of the act in its application to large department stores, where the creditors are numerous, and the stock of merchandise immense. The lapse of time necessarily incident to a compliance with the provisions of the act would have a strong tendency to prevent advantageous sales by the class of

merchants affected. In many instances it would, doubtless, require many days, or even months, to complete such an inventory and give such notices; and in active business communities purchasers are not likely to look with much favor on such delays. In this age of competition it is quite apparent that this would place such a merchant at a great disadvantage in his struggles to provide for his family—in competing with his neighbor who has no creditors. These same disadvantages would likewise follow the purchaser of the merchandise, in his endeavor to again dispose of the goods if he should happen to be a debtor.

The act appears to be unreasonably restrictive, and is liable to subject individuals to punishment for acts wholly innocent. It seems calculated to inflict upon the seller the loss of an advantageous sale, and cause the purchaser to refrain from making what might to him be an advantageous purchase, because of the risk of delay. It is favorable to one class of merchants and unfavorable to another, and thus places competitors in the same line of business upon different planes. In its operation, as to one class of merchants, it brands as criminals persons perfectly solvent, and abundantly able to discharge their debts and obligations, for making bargains according to customs and usages which have prevailed in the commercial world from time immemorial, while as to the other class the same bargains would be lawful. It holds out advantages to one and denies them to another, both pursuing the same business for a livelihood. As to the debtor class, it prevents a free exchange of lawful commodities, and thus ³²⁵ operates in restraint of trade. Undoubtedly, the legislature has power to legislate as to the general right of debtors to dispose of their property, and in enacting such legislation the legislature has the right to consider the debtor's right of disposal of his property by contract or otherwise in connection with the general right of creditors to have afforded an opportunity to collect their claims; but such legislation must not transcend constitutional limitations, or invade the guaranteed rights and liberties of individuals. If within such limitations, such legislation will be upheld, although it be deemed unwise, or, in its operation, unfair and unjust. So the act in question, as we have seen, would evidently, in its general operation, result unjustly and unfairly; yet, if it does not trench upon constitutional law, it cannot be held void.

The appellant, however, claims that the enactment interferes with and abridges his inalienable rights, as well as those of

for his and their protection against the consequences which naturally flow from such an enactment he appeals to section 1, article 14, of amendments to the constitution of the United States, which, on this subject, provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For like reasons he appeals to section 1, article 1, of the constitution of this state, which inter alia, provides: "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances"; and also to section 7 of article 1, which provides: "No person shall be deprived of life, liberty or property, without due process of law." These constitutional provisions constitute the supreme law of the ³⁹⁶ commonwealth upon this subject. To that law the executive, the legislative, and the judicial departments of the government alike must bow obedience, as well as every subject. It forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties. An enactment, therefore, which deprives a person arbitrarily of his property, or of some part of his personal liberty, is just as much inhibited by the supreme law as one which would deprive him of life. And "liberty," in the sense in which the term is here employed, is not restricted to mere freedom from imprisonment, but it embraces the right of a person to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and to be free in the enjoyment and disposal of his acquisitions, subject only to such restraints as are imposed by the law of the land for the public welfare. The word "liberty," as thus employed in the constitutions and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our

religious, civil, political, and personal rights, including the right in each subject to purchase, hold, and sell or dispose of property in the same way that his neighbor may; and of such liberties no one can be deprived except by due process of law.

Property has some essential attributes without which we could not conceive it to be property. Among these are use, enjoyment, susceptibility of purchase, sale and of contracts in relation thereto. The taking away of any one of the essential attributes may violate the constitutional guaranty that no person shall be deprived of his property without due process of law. ³⁹⁷ clearly as in case of a physical taking without due process of law. An enactment, therefore, like the one in controversy, which deprives an owner of his liberty to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business might lawfully do, invades his rights guaranteed by the constitution, and cannot be upheld; and to prevent the free exchange and sale or disposal of property according to the immemorial usages of trade is to deprive it of one of its main attributes. "The third absolute right, inherent in every Englishman," says Sir William Blackstone in his classification of fundamental rights, "is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land": 1 Blackstone's Commentaries, 138. The right thus referred to and defined by the illustrious commentator is absolute and inherent in every American, subject of the United States, by virtue of the supreme law of the land. Therefore, "when a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power": *Wynehamer v. People*, 13 N. Y. 378, 398. Judge Cooley, in his work on Constitutional Limitations, sixth edition, 484, speaking of doubtful or questionable legislation, says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legis-

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lature should undertake to provide that persons following some specified lawful trade or employment should not have capacity ³⁹⁸ to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness.'" In *Bank v. Divine Grocery Co.*, 97 Tenn. 603, 37 S. W. 390, it was said: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate manner, is as much depriving him of his property as if the property itself were taken." In *People v. Otis*, 90 N. Y. 48, it was said: "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provisions." In *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621, it was said: "The right to use, buy and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts." So, in *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, it was observed: "Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts. We do not say that such rights cannot be regulated by general law, but we do say that the legislature cannot single out one class of persons who are competent to contract, and deprive them of rights in that respect which are accorded ³⁹⁹ to other persons. The constitutional declaration that no person shall be deprived of life, liberty, or property without due process of law was designed to protect and preserve their existing rights against arbitrary legislation as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of

the right to make and enforce ordinary contracts, and they introduce a system of state paternalism which is at war with the fundamental principles of our government, and as we have before said, are not due process of law." *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343, is a case where the legislature had passed an act prohibiting the sale or disposal of any article of food, or any offer or attempt to do so, upon any representation or inducement that anything else would be delivered as a gift, prize, premium, or reward to the purchasers, and provided that any person violating any of its provisions should be deemed guilty of a misdemeanor. Mr. Justice Peckham, holding the enactment unconstitutional and void, in the course of his opinion, said: "It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid, as plainly violative of the constitutional provision under discussion." Again, he said: "Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. But that there is a limit even to that power, under our constitution, we entertain no doubt, and we think that limit has been reached and passed in the act under review. The power has been unlawfully exercised in this instance ⁴⁰⁰ for the same reason that we have already stated—because it violates the constitutional provision which secures to each person in this state his liberty and property, except as he shall be deprived of one or both by due process of law." In *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585, Mr. Justice Field, speaking of constitutional rights, said: "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and

pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright": *Matter of Application of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *City of Clinton v. Phillips*, 58 Ill. 102, 11 Am. Rep. 52; *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, 29 L. R. A. 257; *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220.

Nor can the act be sustained, in its present form, as a proper exercise of the police power of the state. That power, though somewhat shrouded in mystery as to its limits, which are not easy to prescribe with precision, has stood sponsor for multitudes of legislative enactments; but such enactments were nevertheless always bound to be within constitutional limits. ⁴⁰¹ The power, however broad and comprehensive, is not paramount to the constitution, but is always bounded by its provisions. If, therefore, an act of the legislature is repugnant to a provision of the constitution, it cannot be held valid as a proper exercise of the police power. Likewise, if a right of property or of person be protected by the constitution, it cannot be destroyed by any exercise of the police power either by the legislature or the executive power of the state.

Neither the legislature nor the executive can, under the guise of police regulation or otherwise, arbitrarily or unjustly, without good cause, restrict or infringe upon the property rights or the liberty of any subject within the protection of the supreme law; and whenever the legislature undertakes to determine what is a proper exercise of police power, its determination is a subject for judicial scrutiny. The power may be exercised to promote the safety, health, comfort and welfare of society, and to sustain legislation as a proper exercise of the police power it must have reference to some such end. By virtue of that power the use of property is regulated by enforcing the maxim, "*Sic utere tuo ut alienum non laedas.*" The enactment in controversy does not appear to have reference to either

of the objects here indicated. It can hardly be said that a law which prevents a person, though indebted, who is abundantly able to pay his debts, from selling his property in the same way his neighbors do, and in accordance with a time-honored custom or usage, either promotes the safety, health, comfort or welfare of the community or the state. If the act referred generally to insolvent debtors it would present a different question; but it relates simply to debtors and purchasers of debtors of a particular and specified business, whether solvent or insolvent; so that the merchant who is worth a fortune over and above his indebtedness, and who is able to respond instantly to his creditors, who may be only such because of convenience ⁴⁰² in trade and business transaction, nevertheless finds himself, under the provisions of the act, deprived of the liberty to sell his goods, or to contract in relation thereto in the same manner that others engaged in the same business may lawfully do. Not only this, but by making a sale which would be perfectly lawful if made by his neighbor, both he and his purchaser become criminals, and amenable to the penalty provided in the act.

Looking again at the provisions of the enactment, it will be observed that it aims at but one kind of business—the mercantile—and impliedly and arbitrarily divides those engaged therein into two classes. The merchants of the one class being unaffected in their property rights, may make sales and contracts in relation thereto as they see fit; while the same kind of sales and contracts, if made in the same manner by the merchants of the other class, are not only declared void, but will render both the sellers and purchasers liable to criminal prosecution. The enactment, as we have seen, not only places the debtor class in the mercantile business at a great disadvantage in competing with others in the same line of business, but its provisions are exceedingly strict and oppressive. Nor do its provisions apply generally to all debtors within the commonwealth. They apply only to merchants, who are debtors, while farmers, miners, manufacturers, traders and other dealers, though debtors, may sell and dispose of their property when and as they please so long as they act in good faith. If the act is designed to prevent fraud, why not make it general? Looking alone at the debtor class, there appears to be such a discrimination as is difficult to reconcile with justice and fair dealing. Nor do we perceive any justification for restraining a merchant who is in debt, but solvent, from selling his merchandise, in whole or in

part, as he may deem most advantageous, in order to prevent one who is insolvent from exercising the same privilege.

There is another feature which must be deemed quite material in determining the validity or invalidity ⁴⁰³ of this legislation. Under the terms of the act "a sale of any portion of a stock of merchandise," or "a sale of an entire stock" in bulk, made otherwise than as in the act provided, "is fraudulent and void as against creditors," and renders both the seller and buyer liable to criminal prosecution. Now, it will be noticed that nowhere in its provisions is there an exemption of any sale by administrators, executors, trustees, assignees for the benefit of creditors, trustees in bankruptcy, or public officers acting under judicial process. There being no such exemption, it would seem that such sales of merchandise owned by debtors, made by persons acting in a fiduciary capacity or under judicial process, must also be made in accordance with the provisions of the act, in order that the seller and purchaser may avoid the penalties provided. It is evident that such a law would not only deprive property of one of its chief attributes, but would greatly hamper the administration of estates and retard the enforcing of judicial process. Nor is this law necessary for the public weal. Broad and extensive as the public power of a state is, it cannot be assumed that it warrants such legislation as this. It is true, there are extreme cases where the exercise of that power is justified by the maxim, "Salus populi suprema lex est," and so, in some cases of great emergency and overruling necessity, the taking or destruction of property, even without compensation and without due process of law, may be justified; but such is not this case. The police power can never avail to declare an act valid when the constitution says it is invalid. "The limits to the exercise of the police power can only be this: the regulation must have reference to the comfort, the safety, or the welfare of society; it must not be in conflict with the provisions of the Constitution": Potter's *Dwarris on Statutes and Constitution*, 458.

Speaking of the regulation of the conduct of corporations whose charters are inviolable, by the legislature, under the police power, Judge Cooley says: "The limits to the exercise of the police power in these ⁴⁰⁴ cases must be this: The regulations must have reference to the comfort, safety or welfare of society. They must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges

which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise": Cooley's Constitutional Limitations, 6th ed., 710. In *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694, Mr. Justice Colt said: "To a great extent the legislature is the proper judge of the necessity for the exercise of this restraining power. It is not easy to prescribe its limit. The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation courts will interfere to protect the rights of the citizen." In *Matter of Application of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, Mr. Justice Earl says: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it really relates to and is convenient and appropriate to promote the public health." Again, referring to the same subject, he says: "Such legislation may invade one class of rights to-day and another to-morrow, and, if it can be ⁴⁰⁵ sanctioned under the constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one." In the *Slaughter-House Cases*, 16 Wall. 36, 87, 21 L. ed.

394, Mr. Justice Field, referring to the police power of the state, said: "All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions or fundamental principles they cannot be successfully assailed in a judicial tribunal. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment." So, in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385, Mr. Justice Brown said: "To justify the state in thus interposing its authority in behalf of the public, it must appear: 1. That the interests of the public generally, as distinguished from those of a particular class, require such interference; and, 2. That the means are reasonable for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupation. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts": Tiedeman's ⁴⁰⁸ Limitation of Police Power, secs. 85, 194; *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, 29 L. R. A. 257; *Ex parte Whitwell*, 98 Cal. 73, 35 Am. St. Rep. 152, 32 Pac. 870, 19 L. R. A. 727; *Austin v. Murray*, 16 Pick. 121; *Commonwealth v. Alger*, 7 Cush. 53, 85; *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245, 24 L. R. A. 195; *Coe v. Schultz*, 47 Barb. 64; *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. Rep. 273, 31 L. ed. 205.

The respondents cite and rely upon several cases from the states of Massachusetts, Maryland, Tennessee, and Washington, where enactments upon the same subject were enforced. While enactments of similar character have been upheld in those states, an examination shows that they all differ materially in important features from the one here under consideration. The law in Massachusetts exempts all sales from its provisions made by officers acting in a fiduciary capacity or under judicial process; and, while it declares a sale made in violation of its provisions fraudulent and void as against creditors, it does not subject the seller and buyer acting in disobedience of the law to criminal prosecution: *Mass. Stats.* 1903, p. 389, c. 415. Notwithstanding this, however, it seems apparent from the

opinion in *Squire & Co. v. Tellier* (Mass.), 69 N. E. 312, that the supreme court of that state regarded their statute as going to the very limit of constitutional authority, when they said: "Although the requirements of the act are very strict, we cannot say that the determination of the legislature, as between the interests of owners of stocks of merchandise and their creditors, was so far wrong as to render the statute unconstitutional." We apprehend, from a perusal of that opinion, that if there, as here, the determination of the legislature had gone to the length of applying the provisions of the act to persons acting in a fiduciary or official capacity and under judicial process, and provided ⁴⁰⁷ criminal punishment for the persons affected if they disobeyed such provisions, the court would have hesitated before pronouncing the act constitutional.

Under the act of the state of Maryland, a sale made in disobedience of the statutory provisions is not absolutely fraudulent and void, as under our enactment, but is simply "presumed to be fraudulent and void as against the creditors of the sold": Md. Laws 1900, p. 907, c. 579. In the case cited from that state the question of the constitutionality of the act was neither presented nor decided: *Hart v. Roney*, 93 Md. 432, 49 Atl. 661.

So, under the act of Tennessee, a sale made in disobedience of the provisions thereof is only "presumed to be fraudulent and void as against creditors of the seller": Tennessee Acts, 1901, p. 234, c. 133. The supreme court of Tennessee held the act valid, Mr. Justice Wilkes dissenting: *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

It will be noticed that in none of the acts thus far referred to, except in our own, is disobedience of the provisions thereof by the seller and buyer made a criminal offense. The supreme court of Missouri, in *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, 29 L. R. A. 257, determining the validity of an act somewhat similar in character to the one here under consideration, said: "If an owner," etc., "obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may. If he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this—to brand as an

offense that which the constitution designates and declares to be a right, and therefore an innocent act; and consequently we hold that the statute which professes to ⁴⁰⁸ exert such a power is nothing more or less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law."

The provisions of the act of the state of Washington (Sess. Laws 1901, p. 222, c. 109) are so materially different from those of our enactment that the case of *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947, cited by respondents, as sustaining the statute of that state, cannot be regarded as authority herein. Nor, for the reasons given, can any one of the cases, from the several states referred to, be relied upon as controlling authority in this case.

While it is within the province of the legislature to prevent fraudulent sales as a protection to creditors, still, when it attempts to do this—to remove one evil—it must not so restrict individual rights and disturb industrial pursuits and usages as to cause a score of wrongs.

We are of the opinion that the enactment in controversy abridges some of the inalienable rights of persons guaranteed by the constitution; that it is not a proper exercise of the police power of the state; that it deprives property of one of its chief attributes, and some persons of the liberty to dispose of property as others may; that it punishes criminally one person for the doing of an act which another person in the same line of business may lawfully do; that it deprives the persons to whom it applies of a right of property without due process of law; and that, therefore, it is null and void.

The judgment must be reversed, with costs, and remanded, with directions to the court below to proceed in accordance herewith. It is so ordered.

Baskin, C. J., and McCarty, J., concur.

CONSTITUTIONALITY OF STATUTES REGULATING THE SALE OF STOCKS OF MERCHANDISE IN BULK.

Statutes somewhat similar to that involved in the principal case have been recently enacted in a number of the states, among them being California, Maryland, Massachusetts, Tennessee, Utah, Virginia, Washington and Wisconsin. These statutes all have for their object the prevention of a sale of his stock of goods in bulk by a merchant, whether solvent or insolvent, without notice to his cred-

itors without first complying with various details mentioned in such statutes. The constitutionality of such statutes has been attacked upon the ground that they are class legislation, and amount to a deprivation of property and liberty without due process of law, and that they are not within a valid exercise of the police power of the state.

Contrary to the conclusion reached in the principal case, statutes providing that sales of merchandise in bulk, not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void, or presumed to be void, as against his creditors, unless certain requirements for the information and protection of creditors are complied with, so far as they have received judicial interpretation and construction, have been declared free from objection upon constitutional grounds. Such statutes were expressly held to be valid and constitutional in *Squire v. Teller*, 185 Mass. 18, 69 N. E. 312; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50. *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947. In *Hart v. Roney*, 93 Md. 432, 49 Atl. 661. Such a statute was enforced as valid, though its constitutionality was not expressly passed upon.

In *Fisher v. Herrman*, 118 Wis. 424, 95 N. W. 392, the court assumed the validity of such a statute, although it expressly refused to pass upon the question of its constitutionality because such question was not presented to it either by oral argument or the briefs of counsel.

The cases cited above were called to the attention of the supreme court of Utah and by it commented upon in deciding the principal case. That court distinguished them from the principal case and refused to follow them as controlling authority on the questions involved, for two reasons: 1. Because the statute of Utah, unlike that of either Massachusetts or Washington, failed to exempt from the operation of its provisions persons acting in a fiduciary or official capacity, or under judicial process; and 2. Because none of the statutes of the other states, like that of Utah, made it a criminal offense by both the buyer and seller of the stock of goods, to act in making the sale and purchase in disobedience or disregard of their provisions.

In a late case in Virginia (*Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327) it was held in accord with the rule laid down in the principal case, that the only authority which the state has to regulate or control the private business of a citizen grows out of its police power, or power to enact laws pertaining to the public health, the public safety or the public morals, and that a statute similar in most respects to that involved in the principal case regulating such private business in a manner which in no wise pertains to public health, safety or morals is not a valid exercise of the police power.

LESTER v. HIGHLAND BOY GOLD MINING COMPANY.

[37 Utah, 470, 76 Pac. 341.]

DAMAGES—Measure of for Destruction of Crops.—The measure of damages for injury to or the destruction of growing crops is their value in the condition they were in at the time of injury or destruction, and not the market value at the time of their maturity or during the market season. (p. 990.)

DAMAGES, UNLIQUIDATED—Interest.—In tort for unliquidated damages interest on the damages recovered from the time of the commencement of the action to the time of verdict, cannot be assessed. (p. 991.)

Sutherland, Van Cott & Allison, for the appellants.

Henderson, Pierce, Critchlow & Banette and C. D. Vanan, for the respondents.

471 **BARTCH, J.** This is an action to recover for damages to growing crops. The amended complaint herein was filed April 16, 1902, and it was alleged, in substance, that about June, 1899, the defendant company, having erected the Highland Boy smelter, began operations, and thereafter, to the commencement of this suit, reduced large quantities of copper ores, and thereby caused to be emitted, from the smokestack of the smelter, smoke, gases, and fumes charged with various mineral substances, which were carried by the winds and deposited upon the farm of the plaintiffs, about a mile distant from the smelter; that these substances were highly deleterious to vegetable life; and that, as a consequence, the growing crops and trees on said farm were damaged and destroyed. The answer admitted the erection and operation of the smelter, but denied the other material allegations of the complaint. From the record and evidence it appears that the farm of the plaintiffs is situate from one-half to three-quarters of a mile northeast of the Highland Boy smelter, the west end of it being directly north thereof; that about one and three-fourths miles south of the Highland Boy is situated the Bingham Consolidated smelter; that about one-quarter of a mile south of the latter is the United States smelter; that the Bingham Consolidated was in operation during the latter portion of the time the plaintiffs sue for damages, that both the Bingham Consolidated and the United States smelters were in operation since the commencement of this action; that all the smelters were operated for the purpose of reducing ores; that the wind

in that locality fluctuates, but that its general direction is north and south; and that the damages sued for were occasioned by the reduction of the ores, which created smoke, dust, gases, and fumes, that were carried by the wind onto the plaintiffs' farm and deposited on their crops and trees, causing them to be injured and destroyed. At the trial, the jury returned a verdict in favor of the plaintiffs for damages in the sum of two thousand five hundred dollars, with interest thereon, from the commencement ⁴⁷² of the action to the date of the verdict, amounting to two hundred and fifty-nine dollars and forty-four cents. Judgment was thereupon rendered for the sum of two thousand seven hundred and fifty-nine dollars and forty-four cents, with interest thereon at eight per cent from date thereof. The defendants appealed.

From the theory upon which this case was tried by the defense, it appears to be conceded that the plaintiffs are entitled to some compensation for injuries to their crops and trees, but the appellants insist that the court erred in its charge to the jury respecting the measure of damages. That portion of the charge objected to on this point reads as follows: "The plaintiffs in this case are entitled to recover only such damages to their crops of lucerne, potatoes, oats, corn, beets, wheat, and such things as are sued for, as they were worth at the time when destroyed or injured, and at the place where injured or destroyed. In other words, if they were injured or destroyed at or before the time of harvest in the different years respectively, then in arriving at the damages you must take the market value of such products and crops not later than the prices prevailing at the time of such harvest, or during the market season." This instruction, considered as a whole, is clearly erroneous. The rule stated in the first sentence has the support of authority, but, in attempting to explain it in the last sentence, the court virtually set the rule aside, and misdirected the jury by stating that, in arriving at the damages, they must take the "market value of such products and crops not later than the prices prevailing at the time of such harvest, or during the market season." While, in cases of destruction of growing crops, it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land in dispute, and on other similar lands in the immediate neighborhood cultivated in like manner, the stage of growth of the crops at the time of injury

or destruction, the expenses of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, ⁴⁷³ or within a reasonable time after the injury or destruction of the crops, and while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction, and not the market value at the time of maturity or during the market season. "For destroying or carrying away growing crops, the measure of compensation," says Judge Sutherland, "is their value in the condition in which they were at the time of the trespass": 3 Sutherland on Damages, sec. 1023. In 3 Sedgwick on Damages, section 937, the author says: "In estimating the value of the crop, the prevailing rule seems to be to take its actual value at the time of the trespass, not its probable value, assuming that it would have matured." As to the rule stated in *Smith v. Chicago etc. R. R. Co.*, 38 Iowa, 518, that the measure of damages is the "difference between the market value of the crops when ripe and their value in an injured state, less the cost of growing them," the author, in the same section, says: "This rule, however, is objectionable, because it assumes, without proof, that the crops would have come to maturity." In *Texas etc. R. R. Co. v. Young*, 60 Tex. 201, it was said: "The true measure of damages was the value of the crops at the time they were destroyed. In arriving at that, from the very nature of the question, great liberality in making proof must be allowed, and even the opinions of witnesses qualified by experience to speak upon the subject would be admissible: 1 Wharton on Evidence, 447, 448; 1 Greenl. 440, note. But at last the question is What was the value of the property at the time it was destroyed? That the value of the probable yield at the time the crop would have matured and been gathered is not the true measure is evident for at any stage in the growth of a crop it requires labor to cultivate and gather it, more or less, as the crop may be advanced, and these elements go into the makeup of the value at maturity. If the crop be destroyed ⁴⁷⁴ before maturity, the labor of the farmer is not further directed to it, and he is free to embark in other profitable employment. To give the value of a matured and gathered crop would be to give compensation for labor never performed, and for an injury received." The supreme court of Colorado, in *Colorado etc. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac.

62, held: "The measure of damages for the destruction of growing crops by water from an irrigation ditch is the value of the crops in the condition they were at the time of the injury." So, in *Lommeland v. St. Paul etc. Ry. Co.*, 35 Minn. 412, 29 N. W. 119, it was said: "In such cases the general rule appears to be that the damages are to be estimated as of the time of the injury, and the measure of damages is compensation for the value of the crops in the condition they are in at that time": 3 *Sutherland on Damages*, sec. 1049; *Gulf etc. Ry. Co. v. Carter* (Tex. Civ. App.), 25 S. W. 1023; *Richardson v. Northrup*, 66 Barb. 85; *Handforth v. Maynard*, 154 Mass. 414, 28 N. E. 348; *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 602; *Seely v. Alden*, 61 Pa. St. 302, 100 Am. Dec. 642; *Sabine etc. Ry. Co. v. Joachimi*, 58 Tex. 456; *Gresham v. Taylor*, 51 Ala. 505; *Farr v. Griffith*, 9 Utah, 416, 35 Pac. 506; *North Point etc. Irr. Co. v. Utah etc. Canal Co.*, 23 Utah, 199, 63 Pac. 812; 15 *American Digest*, Century ed., sec. 281, col. 2013; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. St. 142, 98 Am. Dec. 209.

The appellant also contends that the court erred in instructing the jury that they should allow interest on the damages assessed by them in favor of the plaintiffs from the date of the commencement of the action up to the date of the verdict. This contention appears to be well taken. The action was for a tort, and the damages were unliquidated, and this court, in *Nichols v. Union Pac. Ry. Co.*, 7 Utah, 510, 27 Pac. 693, which was an action for a tort, where the damages were unliquidated, and where the jury returned a verdict for so much damages, and so much for interest thereon, held "that there is no authority for the granting of interest ⁴⁷⁵ in such a case." Under the doctrine of that case the instruction respecting interest was erroneous. As a new trial must be granted because of the errors already pointed out, we do not deem it important to discuss and decide the other questions presented herein, since the same questions may not again arise.

The judgment is reversed, with costs, and the cause remanded with instructions to the court below to grant a new trial. It is so ordered.

Baskin, C. J., and McCarty, J., concur.

The Owner of Growing Crops destroyed by the fault of another may recover the value thereof: *Freemont etc. Ry. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948. In *Byrne v. Min-*

neapolis etc. Ry. Co., 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339, it is held that the proper measure of damages for the destruction or loss of growing crops is in general the value of the crops upon the ground, and not the loss as measured by the rental value of the land: See, in this connection, Watt v. Nevada Cent. R. R. Co., 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 76.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

CITY OF BALLARD v. WAY.

[34 Wash. 116, 74 Pac. 1067.]

JUDGMENTS—Presumption of Jurisdiction.—A recital of due service of process in a judgment by a superior court raises a presumption of a valid service, and a person attempting to avoid such judgment must show that no legal service was made. (pp. 996, 997.)

TAX DEED—Street Assessment Lien—Superiority.—A purchaser at a sale for general taxes acquires a title valid as against a lien for a street assessment. (p. 997.)

M. E. Sheldon and J. B. Van Dyke, for the appellants.

H. E. Peck, for the respondent.

117 MOUNT, J. This action was commenced by the city of Ballard in King county, to foreclose two liens against lot 12, block 15, of Gilman Park in said city, for street improvements made in the year 1891, the lot being a corner lot facing upon two streets. On a trial, judgment was entered in favor of the city. Defendants appeal.

The facts in the case are undisputed, and are substantially as follows: In the year 1891, the city of Ballard passed ordinances providing for the improvement of the two streets facing on the property above described, and also providing for assessments of the property to pay therefor. The streets were thereupon improved, but the assessments were declared void by the courts. Subsequently, in 1897, by virtue of an act of the legislature of March 9, 1893, the city passed ordinances providing for reassessments of this lot, to pay the costs of the improvement, together with the penalty and interest thereon. The

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liens created by these reassessments are the ones now sought to be foreclosed.

At the time the improvements and assessments were made the property was owned by the Woman's Home Association, a domestic corporation, of Seattle. After the street improvements were made, general taxes for state, county, and municipal purposes were levied against the lot for the years 1892 to 1896, inclusive. These taxes were permitted by the owner to become delinquent. On October 2, 1900, Alexander McDonald purchased from the treasurer of King county a certificate of delinquency for the general taxes then delinquent against the property in question, and, at the same time, paid taxes due for the years 1897, 1898, 1899. Mr. McDonald afterward brought an ¹¹⁸ action in the superior court of King county against the "Woman's Home Association and all persons unknown, if any, having or claiming an interest or estate in and to the hereinafter described real property," to foreclose his lien for taxes against the lot in question. Thereafter, on the sixteenth day of April, 1901, the said court entered a judgment which recites as follows: "This cause coming on for trial this day, and it appearing to the satisfaction of the court that the notice and summons in said cause was regularly and duly served on the above-named defendants, as the law in such cases requires, and more than sixty days have elapsed since said service, and defendants have failed, neglected and refused to appear and contest or make any appearance at all in said action, it is therefore ordered."

The judgment then proceeds to find that the plaintiff therein has a tax lien against the property, and ordered a sale thereof to satisfy the same. The property was accordingly sold and bid in by Mr. McDonald for the amount of his claim, and thereafter, on April 27, 1901, a deed was issued to him therefor. On May 31, 1901, Mr. McDonald sold and conveyed the property to the appellant George Way. Subsequently Mr. Way also obtained a deed from the Woman's Home Association for the property.

In the record of the case of McDonald v. Woman's Home Association, there is no return of personal service, but there is an attempted publication of summons, which appears to be defective for several reasons. This service, however, is not relied upon as giving the court jurisdiction in that case. Counsel for appellants relies exclusively upon the finding of service in the judgment above quoted. At the trial the validity of

this judgment was attacked upon the ground that the summons had not been served, and respondent was permitted to call Mrs. Ingraham as a witness. This witness testified that she was secretary ¹¹⁹ of the Woman's Home Association from the year 1890 to 1895, and that no one was ever elected to succeed her; that Mrs. Henry Furman was president of the corporation during the years 1899, 1900, and 1901; that the corporation was a local one, and that all the members and officers were at all times residents of King county. She was not asked and did not state that no personal service of the complaint in McDonald v. Woman's Home Association was had upon the association.

It is not questioned here that the reassessment made by the city in 1897 is regular, and that the improvements were made; nor is it questioned that the sale, and all proceedings had under the judgment in McDonald v. Woman's Home Association, are regular and valid, provided the court had jurisdiction to render the judgment. It will therefore be readily observed that there are but two principal questions in the case: 1. Did the court have jurisdiction to enter the judgment in the case of McDonald v. The Woman's Home Association? 2. If so, is the lien for general state, county, and municipal taxes paramount to the lien for street improvements?

1. It is apparently conceded that the record shows no legal service by publication, and appellants do not contend that the record outside of the judgment shows personal service by the return of any officer or person authorized to make it. But they contend that since the court is one of general jurisdiction the finding in the decree "that the notice and summons in said cause was regularly and duly served on the above-named defendants, as the law in such cases requires," is conclusive, and they rely wholly upon this finding. In the case of *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205, this court said: "By the filing of the complaint the court obtains jurisdiction of the subject matter, and by the service of the ¹²⁰ summons, of the person of the defendant; and every act not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it."

This case was followed in *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525, where it was held that the question of service of the summons was a question of fact for the court trying the case to determine, and it was there said:

"The finding of the court 'that service of the complaint and notice had been duly made according to the law,' is not contradicted by merely showing that a summons which was legally insufficient had in fact been published."

To the same effect are the following cases from this court: *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *State v. Superior Court*, 14 Wash. 203, 44 Pac. 131; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064; *State v. Superior Court*, 19 Wash. 128, 67 Am. St. Rep. 724, 52 Pac. 1013; *Kalb v. German Savings etc. Soc.*, 25 Wash. 353, 87 Am. St. Rep. 757, 65 Pac. 559; *Peyton v. Peyton*, 28 Wash. 278, 298, 68 Pac. 757; *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. It is true, as argued by respondent, that some very eminent authorities have said that the "findings of jurisdiction may affirm, in general terms, the service, or due service, of process, without indicating that the attention of the court has been specially called to the kind of service made, or that it has probably based its finding upon other evidence than that disclosed by the record. In such cases it is not reasonable that the general statement should prevail over the evidence contained in the record. It should rather be construed as referring to and founded upon it; and if the service shown by it is not such as will support the judgment, it should be treated as ¹²¹ void, notwithstanding the general statement in the judgment that process has been duly served": 1 Freeman on Judgments, 4th ed., sec. 130, and authorities cited.

But this court early adopted the rule that the recital of due service in the judgment, by domestic superior courts, raises the presumption of a valid service, and that every presumption must be indulged in favor thereof. Accordingly it was held in *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525, that, where there was ample time for another summons to have been issued and served, this court would, on collateral attack, presume such fact in aid of the judgment; and in *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264, where an insufficient affidavit of publication appeared in the record, it was held that we would presume, in aid of such judgment, that other sufficient affidavits were filed; and in *State v. Superior Court*, 19 Wash. 128, 67 Am. St. Rep. 724, 52 Pac. 1013, where the return of personal service was not verified as required, it was said: "The presumption must be that there was a valid ser-

vice. This document might in fact have been sworn to in open court before the judge at the time the judgment was taken." We are satisfied with this rule, and are not disposed to change or modify it now.

Conceding, without intending to decide, that the respondent in this case was at liberty to attack the validity of the judgment in *McDonald v. Woman's Home Association*, no evidence was offered that the defendants in that case were not legally served with process. The only evidence offered or introduced was to the effect that the corporation was a domestic corporation, and all the officers thereof were, at the time the action was begun, residents of King county. The defendant, *Woman's Home Association*, was, therefore, required to be served personally. The judgment shows upon its face that the defendants had ¹²² been served as required by law. In order to avoid the judgment, it devolved upon the respondent to show that no legal service was made, and that the court had no jurisdiction. This was not done. It follows, under the rule above stated, that the court is presumed to have had jurisdiction, and that the judgment is valid.

2. The question as to the priority of liens for general taxes over street assessments has recently been so fully and carefully considered by this court as to need no further discussion. In *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68, we said: "It must be held that the holder of a delinquent general tax certificate is not required to pay local street assessment liens before he can proceed to foreclose and sell under his general tax lien. He is entitled to a decree establishing his tax lien as paramount and superior to all other liens or charges against the property": See, also, *Keene v. Seattle*, 31 Wash. 202, 71 Pac. 769; *State v. McConnaughey*, 31 Wash. 207, 71 Pac. 770. This being the settled rule, it follows that, when *McDonald* foreclosed his paramount lien and sold the property and became the purchaser, he acquired a valid title to the land, against which the respondent cannot now foreclose an inferior lien. If the respondent has any right at all at this time, as against the appellants, such right is limited to a redemption: 1 Black on Judgments, 2d ed., sec. 448, and cases cited.

The judgment of the lower court must therefore be reversed, and the action dismissed.

Fullerton, C. J., Hadley, Dunbar and Anders, JJ., concur.

If a judgment of court of general jurisdiction recites that service of summons was duly made, it must be presumed, according to Kalb v. German Sav. etc. Soc., 25 Wash. 349, 87 Am. St. Rep 757, 65 Pac. 559, that that fact appeared to the court by competent proof. See, further, McHatton v. Rhodes, 143 Cal. 275, ante, p. 125, 76 Pac. 1086.

STATE v. CITY OF SOUTH PARK.

[34 Wash. 162, 75 Pac. 636.]

QUO WARRANTO—Municipal Incorporation.—Quo warranto does not lie against a municipal corporation to test the validity of the election under which it was incorporated. (p. 999.)

P. C. Ellsworth and J. E. McGrew, for the appellant.

Granger & Heifner, for the respondent.

¹⁶³ **HADLEY, J.** This is a proceeding in the nature of quo warranto, the purpose of which, as stated in appellant's brief, is to "test the incorporation of respondent, and to determine whether it is properly incorporated as a city of the fourth class under the laws of Washington." The information charges irregularities as to notice and amendment of petition for incorporation; also that illegal votes were cast at the incorporation election, and that votes were illegally counted for incorporation. The answer denies these charges. At the trial the issues were narrowed by the statement of relator's counsel that they desired to present but two questions of fact: 1. That ten ballots were wrongfully counted by the election board in favor of incorporation; and 2. That three illegal votes were cast by persons not residents of the territory sought to be incorporated. Counsel stated to the court that, when relator had established the above facts, he would ask that the incorporation be declared void. Thereupon the city moved for judgment in its favor, and for the dismissal of the action. The motion was granted, and judgment entered accordingly. This appeal is from that judgment.

This suit was brought against the corporation in its corporate name. No individual is made a party as assuming ¹⁶⁴ to illegally discharge municipal functions. Section 5780 of Ballinger's Code enumerates the grounds for which an information in the nature of quo warranto may be filed. It may be filed against "any person or corporation," but all the subdivisions of the section relate to the usurpation of official or corporate func-

tions by individuals, except the fifth, which relates to acts on the part of corporations by which they forfeit their privileges, or to the exercise of powers not conferred by law. In the latter case the information may be directed against the corporation, but it must recognize that the corporation has theretofore had a legal existence.

An information cannot be directed against a corporation which it charges does not exist. In such case there is no entity in existence upon which service can be made, or which can plead to the information. It is illogical to sue an alleged artificial person for the purpose of obtaining an adjudication that there is no such person. Either there is or is not a corporation. If there is not a corporation, it cannot be sued. The suit, then, must be against the persons who assume to act in a corporate capacity. By bringing suit against the corporation appellant admits its existence. The information, therefore, does not state facts sufficient to constitute a cause of action, since it simply seeks an adjudication that there is not now and never was such a corporation.

In *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795, the appellant sought to remove an alleged cloud for illegal taxes on the ground that the city of Snohomish, which imposed the taxes, never had a legal existence. The attack against the corporate existence was in that case a collateral one, and this court, in holding that such a collateral attack could not be sustained, also gave a further reason for its decision as follows:

165 "But we are of the opinion that the appellant is not in a situation to question the validity of the incorporation of the city of Snohomish, for the reason that he has brought his action against it as a municipal corporation and alleged it to be such in his complaint. . . . But the weight of authority may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. When, therefore, the information is filed against the respondent in its corporate name and process is issued and served accordingly and the respondent appears and pleads in the same corporate character, its corporate existence cannot afterward be controverted": *High's Extraordinary Legal Remedies*, 3d ed., sec. 661. The following cases cited in Mr. High's valuable work as supporting the above we

have examined and find to be in point: *People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843; *State v. Cincinnati Gas etc. Co.*, 18 Ohio St. 262; *State v. Commercial Bank etc.*, 33 Miss. 474; *Rolling Stock Co. v. People*, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. As being also directly in point see the following cases: *State v. Independent School Dist.*, 44 Iowa, 227; *Mud Creek Draining Co. v. State*, 43 Ind. 236; *People v. Rensselaer etc. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *State v. Uridil*, 37 Neb. 371, 55 N. W. 1072.

In *People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843, mention is made of the fact that some authorities seem to draw a distinction between private and municipal corporations, holding that an information may be brought against a municipal corporation by its corporate name, even where its corporate existence is challenged, the proceeding in such case being held to be against the city as a corporation *de facto* ¹⁰⁸ and not as a corporation *de jure*. It was held, however, that no exception to the general rule exists in the case of municipal corporations. We are also unable to see any good reason in principle why such exception should exist unless a statute shall so declare.

For the foregoing reasons, the court did not err in granting the motion for judgment of dismissal. The judgment is affirmed.

Fullerton, C. J., and Anders, Mount, and Dunbar, JJ., concur.

Quo Warranto will lie, it has been held, to attack the validity of the incorporation of a village: *Kamp v. People*, 141 Ill. 9, 33 Am. St. Rep. 270, 30 N. E. 680; and see the note to *People v. Rensselaer etc. R. R. Co.*, 30 Am. Dec. 48, 49.

STATE v. GLINDEMANN.

[34 Wash. 221, 75 Pac. 800.]

CONSTITUTIONAL LAW—Incest.—A statute defining incest, without including actual knowledge on the part of the defendant of his relation to the particeps criminis as a necessary element of guilt, is not unconstitutional. (p. 1002.)

CRIMINAL LAW—Incest—Information—Scienter.—If a statute upon incest is silent as to any scienter, not using the words "knowingly," "willfully," or the like in describing the offense, it is not necessary to allege or prove that the defendant knew the relationship existing between him and the particeps criminis. (p. 1002.)

CRIMINAL LAW—Incest—Defense of Insanity—Evidence.—If the defense of insanity is set up to charge of incest, the exclusion of the record of the appointment of a guardian for the defendant as being of unsound mind is not error if the record of the actual adjudication of his insanity, made just prior to the guardianship proceeding, has already been admitted in evidence. (p. 1003.)

CRIMINAL LAW—Incest—Insanity as Defense—Guardianship of Wife—Evidence.—If a husband charged with incest sets up insanity as a defense, the record of the adjudication of his insanity and of the appointment of his wife as his guardian is not admissible in evidence to show that she who instituted the prosecution for incest, was in duty bound to look after his defense. Her attitude in the matter can be better shown by other evidence. (p. 1004.)

TRIAL—Comment on Evidence.—It is reversible error for the court, upon a dispute as to what a witness has testified to upon a material point, to declare in the presence of the jury what such evidence was, and that the stenographer's report thereof is wrong. (p. 1005.)

P. C. Shine, Townsend & Moore and W. F. Townsend, for the appellant.

H. Kimball and M. Poindexter, for the respondent.

228 **HADLEY, J.** Appellant was charged with the crime of incest committed with his own daughter. Having been tried and convicted, he has appealed to this court. He first assigns as error that the court overruled his demurrer to the information. The essential part of the information is as follows: "That the said defendant, John Glindemann, in the county of Spokane and state of Washington, on or about the first day of January, 1902, did willfully, unlawfully and feloniously have sexual commerce with and carnally know one Marie Glindemann, the said Marie Glindemann then and there being a female and a daughter of said John Glindemann, thereby committing the crime of incest."

Incest is defined in sections 7228 and 7229 of Ballinger's Code as follows: "Incest is the sexual commerce of persons related

within the degrees wherein marriage is prohibited. . . . Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest."

It is urged that actual knowledge, on the part of the accused, that the relationship is within the said degrees of consanguinity is necessary in order to constitute the crime. ²²⁴ It is insisted that the criminal intent cannot exist without actual knowledge of the relationship. Appellant contends that the statute defining incest should include the element of knowledge on the part of an accused, and that its failure so to do is in violation of the fourteenth amendment to the constitution of the United States, as an attempt to deprive one of liberty without due process of law. But if the statute itself shall not, for that reason, be held to be violative of the constitutional principle, it is urged that, in any event, the information must go further than the statute, and include the element of knowledge in its charging part, before it can be held that it charges a crime. Appellant cites *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115, as supporting the view that the information charging one with the crime of incest must charge knowledge of the relationship on the part of the defendant. What is said at page 250 is particularly referred to, as follows: "The third and last objection to the sufficiency of the information is that it does not allege that Carrie Barnett had knowledge of the relationship existing between herself and the defendant. The information does allege that defendant had knowledge of the relationship and this is sufficient, under our statute, without alleging that the female also had that knowledge."

It is true the inference may be drawn from the above language that the court in that case might have held that the allegation of knowledge was necessary, if it had been omitted as to the defendant. However, the point raised here was really not decided in that case. On this subject the following statement of the rule appears in volume 16 of *American and English Encyclopedia of Law*, second edition, 138: "Where the statutes are silent as to any scienter, as where they do not use the words 'knowingly,' 'willfully,' or the like in describing the offense, it will not be necessary to allege and prove affirmatively that the defendant knew the ²²⁵ relationship existing between him and

the particeps. While this is true, still it would seem, upon reason, that the defendant's ignorance of such fact would constitute a valid defense."

The crime here is charged substantially in the language of the statute, and is sufficient within the rule above stated. See the following cases in support of the rule, as applied particularly to cases of incest: *State v. Bullinger*, 54 Mo. 142; *Simon v. State*, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399, 716; *State v. Wyman*, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900; *State v. Dana*, 59 Vt. 614, 10 Atl. 727.

It was held by the United States district court, district of Washington, in *In re Nelson*, 69 Fed. 712, that a statute of Washington territory, similar to the present state statute, was not invalid because of the omission of the word "knowingly," or any equivalent word or phrase, to make knowledge of the relationship an element of the crime. Under the above authorities, we hold here that the court did not err in overruling the demurrer to the information.

It is next assigned that the court erred in excluding evidence, offered by appellant, that the wife of appellant had been, and then was, the duly appointed, qualified and acting guardian of appellant. Appellant not only denied the commission of the alleged crime, but also interposed the defense of insanity. A record was introduced to the effect that he was adjudged to be insane by a California court in the year 1898, and also another record showing that he was, in September, 1902, adjudged, by the superior court of Spokane county, to be then insane. Following the last adjudication, the said superior court appointed Anna Glindemann, the wife of appellant, as his guardian, on the ground that appellant was of unsound mind. It was the record of said appointment that appellants sought to introduce in evidence. It is argued that the fact that appellant ²²⁶ was still under guardianship tended to support the presumption of mental disability. We believe, however, that it could have been no more than cumulative evidence in this case, and that it was not reversible error to exclude it. The record of the actual adjudication of his insanity, made just prior to the guardianship proceeding, was in evidence, and the guardianship record was valuable only for the same purpose for which the insanity record was introduced.

It is further urged that the record was competent as bearing upon the contention that appellant's wife is prejudiced against

him in this prosecution. It is argued that, whereas it was her duty as guardian to see that appellant was defended in this action, yet she, in fact, was the instigator of the prosecution. We think the real spirit of the wife's attitude toward the husband can be better shown by other evidence than by this offered record. It was therefore not error to exclude it when offered for that purpose.

It is next assigned that the court erred in disputing the statements of counsel and the shorthand report of two stenographers as to what a certain answer of the prosecuting witness had been, in stating what he believed her answer to have been, in striking out the former answer of the witness, and in permitting her to adopt the court's version of what her answer had been, all in the presence of the jury. This assignment, we believe, involves error. We are compelled to set forth here a portion of this record, which we would fain omit. But we see no other way to make clear the point raised under this assignment of error. The following is the portion of the record to which we refer:

"Q. What did you mean by saying in cross-examination that you supposed the reason you did not become pregnant was because he did not reach your private parts? A. I don't understand. Q. I understood you to say that the reason you did not become pregnant was that your father's private sexual organ did not reach up to your private parts? ²²⁷ The Court: She did not say that. Q. Just explain what do you mean by that? Mr. Townsend: Objected to. (Objection sustained.) Q. Explain what you meant by the answer that the reason you supposed you did not become with child was that it did not reach up to your privates? A. What he passed away. Q. What he passed away did not reach up to your womb, is that what you mean? Mr. Townsend: Objected to. The Court: She did not say that. I don't think the witness said that. [Here the former question from the cross-examination of this witness and her answer was read by the stenographers for the state and for the defendant, as follows: Q. Why? A. Because it did not come up to my privates.] The Court: The stenographers are wrong. She said the reason was because it did not reach up far enough. Q. I will ask you if that is what you said in answer to that question? A. I think I did. Mr. Poindexter: I move to strike out that former answer. The Court: The motion is granted. Mr. Townsend: Exception."

It seems to us that the above extract from the record is largely self-explanatory. Owing to the peculiar nature of the crime charged, it will be seen that the testimony over which the controversy arose was very important. As counsel for both the state and the defense, as well as both stenographers, seem to have understood it, the argument might well have been made to the jury that actual penetration was wanting, and that the crime of incest was therefore not committed. We think the remarks of the learned judge were direct comments upon material testimony in the presence of the jury. It was for the jury to say what the witness had testified, and it was appellant's constitutional right that the court should not express an opinion before the jury upon evidence of such vital importance to his defense. Moreover, the record discloses that the court's remarks, together with counsel's subsequent question, amounted to suggestions to the witness which she readily followed. The well-known tendency of jurors to give much ²²⁸ weight to the court's views of the testimony, if they are able to discover what those views are, we think made the remarks of the court prejudicial to appellant's constitutional rights.

We see no essential distinction between the principle involved here and that which was discussed in *State v. Priest*, 32 Wash. 74, 72 Pac. 1024. Counsel argue that there is a distinction, in that the court's remarks in the above case were directed to the jury, while in the case at bar they were directed to counsel. They were, however, made in the presence and hearing of the jury, and in practical effect this case, we believe, should not be distinguished from the one cited. We think the matters discussed under this assignment were so material that they constitute reversible error.

For the foregoing reasons, the judgment is reversed, and the cause is remanded with instructions to the lower court to grant the motion for a new trial.

Mount, Anders, and Dunbar, JJ., concur.

In an Indictment for Incest, it is not necessary, unless required by statute, to allege knowledge of the relationship on the part of the defendant: *State v. Wyman*, 59 Vt. 527, 59 Am. Rep. 753. It is otherwise, however, where the statute provides that "parties having knowledge of their relationship shall be guilty": *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691. In *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, it is held that where one party has knowledge of the relationship and the other has not, the former may be convicted and the latter acquitted. In a prosecution for rape, it is no defense that the

accused believed the prosecutrix to be over the age of consent: *Smith v. State*, 44 Tex. Cr. Rep. 137, 100 Am. St. Rep. 849, 68 S. W. 995.

Insanity as a Defense to Crime is discussed in the monographic notes to *Knights v. State*, 76 Am. St. Rep. 83-97; *People v. Hubert*, 63 Am. St. Rep. 100-108. And see the recent cases of *State v. Keeri*, 29 Mont. 508, ante, p. 579, 75 Pac. 362; *State v. Clark*, 34 Wash. 485, post, p. 1006, 76 Pac. 98.

STATE v. CLARK.

[34 Wash. 485, 76 Pac. 98.]

JURORS—Examination as to General Qualifications—Waiver. In a criminal prosecution it is not error to fail to require the prosecuting attorney to examine the jurors as to their general qualifications. Either the prosecutor or the defendant may waive his right to so examine the jurors, or waive any disqualification in any juror. (p. 1010.)

CRIMINAL LAW—Instructions Defining Degrees of Murder.—On a prosecution for murder, it is not error to repeat instructions defining murder in the first and second degrees, on the ground that they tend to intensify the crime as murder, when the only purpose or effect of such instructions is to more fully point out the distinction between the different degrees of murder. (p. 1011.)

CRIMINAL LAW—Insanity as Defense.—The Burden of Proving insanity as a defense to crime is upon the defendant, who must establish it by a preponderance of the evidence. (p. 1015.)

CRIMINAL LAW—Insanity as Defense—Instructions.—If insanity is set up as a defense to murder, it is not error to instruct the jury to convict if satisfied beyond a reasonable doubt that the accused committed the crime as charged, if other instructions fully and fairly inform the jury upon the defense of insanity. (p. 1015.)

TRIAL—Instructions.—It is not error to refuse to give requested instructions already covered by instructions given. (p. 1015.)

CRIMINAL LAW—Murder—Sufficiency of Evidence.—A conviction of murder in the first degree must stand, when the circumstances show that there can be no possible doubt that the defendant did the killing through jealousy, although no one saw it done, and when there is no evidence of his insanity, set up as a defense, except his own statement that he did not know what he was doing at the time, and the statement of witnesses that he "looked wild" and "acted nutty." (pp. 1015, 1016.)

Israel & Mackay, for the appellant.

F. C. Owings, for the respondent.

487 MOUNT, J. Appellant was convicted of the crime of murder in the first degree, and sentenced to death. From this judgment he appeals.

The facts are briefly as follows: On January 20, 1903, the appellant, Charles Clark, and Leila Page were living together in a house of prostitution in the city of Olympia. Leila Page was the mistress of the house. They had been so living for about a year. On the date named appellant and Leila Page, at about 4:30 o'clock in the morning, retired to their bedroom. They had both been drinking and she was sick. During the day and night of the 19th of January, they had been quarreling on account of the intimacy existing between Leila Page and one Nate Kirkendall. Appellant had threatened her life. Soon after they retired to their room, Leila Page requested Cleo Reynolds, an inmate of the house occupying the next room, to order a lunch for her. The lunch was ordered over the telephone to be brought from a nearby restaurant to the room occupied by appellant and Leila Page. When the waiter brought the lunch on a tray, Leila Page was lying on the bed with her face from the door and with all her clothes on, apparently asleep, breathing heavily. Appellant was standing in the middle of the room with his coat, vest and hat off. He took the tray and placed it on the floor and said to the waiter that he had no money. He called to Cleo Reynolds, and asked her to pay for the luncheon. The waiter thereupon left the room, and the door was bolted after him from within. Cleo Reynolds paid for the luncheon, and the waiter went away. Cleo Reynolds went back to her room and soon fell asleep. She heard nothing more until about 8:30 o'clock in the morning, when she was awakened by the appellant calling her in a muffled voice. She ~~488~~ thereupon got up and went to the door of the room occupied by the appellant and Leila Page, but the door was fastened and she could not get in. She could hear appellant speaking her name. She thereupon asked him to open the door. After a short time appellant succeeded in unbolting the door, which was opened, and appellant fell across the open doorway, striking his head against the door jamb. His hands and face and clothes were covered with blood. He was apparently unconscious. He was dressed as above stated. Leila Page was lying on the bed, dead. All her clothes were on, as above described. Her forehead had been crushed, as with the back of an ax, and a long gash was cut across her throat from about the center of the neck to the right ear. Appellant had several cuts in his neck and throat and on his head. His mouth was burnt as if with carbolic acid. There was no evidence in the room of any struggle. An ax, a small penknife covered with blood, and a

small bottle containing carbolic acid were found in the room. A carving knife was also found under the cover of a settee. Before appellant was taken from the scene he was told by a policeman that he was going to die, and was asked who did the killing. He at first said he did not know. Upon being asked if he was sure, "said he thought Nate did it." Appellant was thereupon taken to a hospital, and soon recovered from the effects of his wounds. In June, 1903, he was put upon trial under an information charging him with murder in the first degree. His defense was insanity. His version of the affair is as follows, quoting from the record:

"Q. Now, I will direct your attention to the night before she died—Sunday night—and I will ask you to start from that point and detail everything that you did, as you remember it, in connection with Leila Page, or ⁴⁹⁹ regarding her, and everything that was done that night, and the next day, describing your conditions and feelings during that time. Just tell the jury all about it. A. Well, Sunday night I went down to the house about midnight and she was not there. The girls said she was over to the 'Star.' Q. What did you do? A. I went to bed and went to sleep, and she came in some time in the morning, I think, along about 3 or 4 o'clock. I do not know just what time. She said something—I don't know what she said. And then she put on her clothes and went out, and I don't know where she was going or where she went. Then I went back to sleep. The next morning I got up about noon. She was not in bed, and I looked in the other rooms and she was not there, and I asked Cleo if she had seen her and she said, no. I went down to the wine closet and got a drink of brandy and went to eating my breakfast and went up town. I went to Frank Dickerson's saloon—I was working there—and I asked Frank if he had seen her and he said he had not. The night before I asked him—I opened up the games we were working at and went to work. I thought I would wait until evening, but I could not wait. I felt pretty nervous and went out to the bar and got a drink of brandy. Then I thought that Nate roomed at the Union block and she might be up there. I asked the butcher if he had seen her that morning and he said that he had, that she had been there and went on up toward Swantown. I walked over as far as the Union block and then I walked up and down in front of the Union block a few times. I thought I must be mistaken and went back to the house. I went back to the house and they said she had been there and gone out again. I went back. I don't

know how many times I made the trip. It seemed like a dream. I couldn't get any information. I finally went to the Union block, but I don't remember going to the Union block twice. I remember going to Mrs. Hubbard's and finally Mr. Wentz came in with the tray in the room where she was, Cecil Knight's room, and she was lying there on the bed; and I tried to rouse her and told her to get up, and I had her by the shoulder and she hit my ⁴⁹⁰ hand and my finger nail scratched her neck; I don't remember what was done or what was said either, but we went home together. She told me she had been at the Union block the night before with Nate Kirkendall. I asked her if she intended to leave me and she said she didn't. Then we embraced and I kissed her several times and I went downstairs and she went downstairs and left the house. She went over to the 'Star'—I guess it is the 'Wigwam' now. And I went over and asked if she was there and they said she was not. I went back to the house again and telephoned over after a little while and they said she was not there. I sent Cleo out to look for her and she came back and said she was over there and wanted me to come over for her. I was not drunk then and hadn't been drinking any time during the day. I have been drunk and I know what the feeling is. I don't say that the statements made by the witnesses is not so, aren't true and didn't happen. If they did happen I have no recollection of it. We went upstairs to go to bed. She told Cleo to order some lunch; I remember that quite well. I went into the room—I didn't know where she was at that time—and I started to undress myself. I don't remember the boy bringing the tray in or who let him in—I don't remember anything of that. Then again I was lying in the hall, and then again I was being carried out, and then again some one poking something down my throat, and then again I came to and found myself lying in a strange bed just like a person would wake up out of a dream."

This is the substance of the evidence on the part of the defense. Other facts necessary to an understanding of the points presented will be stated hereafter. Appellant insists, first, that the court erred in not requiring the attorney for the state to examine the jurors as to their general qualification. It appears that the individual jurors were examined first by the prosecutor for actual and implied bias, and passed for cause; that thereupon they were examined by counsel for appellant. After the state had ⁴⁹¹ exercised all its peremptory challenges, and the appellant all of his peremptory challenges but one, and had

waived that one, appellant objected to the whole panel upon the ground that the prosecutor had not examined the jurors as to their general qualification. This objection was overruled by the court. Counsel argues that, because the statute provides that no person is competent to act as a juror unless he is (1) an elector of the state; (2) a male inhabitant of the county for the year next preceding the time he is called; (3) over twenty-one years of age; (4) in possession of all his faculties and of sound mind; (5) able to read and write the English language; and (6) has never been convicted of a felony (Pierce's Code, sec. 5939); and because it is provided that "the jurors having been examined as to their qualification, first by the plaintiff and then by the defendant, and passed for cause" (Pierce's Code, sec. 601), it is therefore the duty of the prosecutor to examine the jurors as to their general qualifications. While it is true that persons, not possessed of the qualifications named in section 5939, *supra*, are incompetent under the statute, it does not follow that the prosecutor may not waive his right to examine the jurors, and also waive the disqualifications named. The statute relating to the examination is simply declaratory of the rights of the plaintiff and of the defendant. Either may waive his right to qualify or disqualify the jurors. That this is true is manifest because of the provision of the next section, which is as follows: "But no act of a grand or petit jury shall be invalid by reason of such person or persons aforesaid, qualified in other respects, serving thereon; nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the ⁴⁹² finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned": Pierce's Code, sec. 5940.

In this case the appellant was not denied the right to examine the jurors as to their general qualifications. He had the opportunity, and failed or refused to exercise it. He simply insisted that the prosecutor should make the examination. It does not appear here that any of the jurors were in fact incompetent or disqualified under the statute. But, even if it did so appear, appellant, under the provisions of section 5940, *supra*, could not take advantage of that fact unless the juror was challenged for the specific cause, the challenge overruled, and an exception taken. It was, therefore, not error for the court to deny the appellant's request.

Appellant next insists that the court erred in repeating the instructions defining murder in the first and second degrees, because by so doing the court intensified the crime as being murder. We think no such result could be inferred. Both plaintiff and defendant prepared instructions in the case, and requested the court to give the same. After reading those prepared by the prosecution, which fairly covered the case, the court gave several instructions requested by the defendant, among which were two paragraphs defining murder in the first and second degrees, which clearly and more fully pointed out the distinction between those two degrees of murder than the definitions already given. While it would not have been error to have refused these instructions, they were given by the court, no doubt, for the purpose of pointing out to the jury more clearly the distinction between these two degrees of murder, so that the jury might not be confused therein. This was manifestly the object of the court, and we are clearly of the opinion that the ⁴⁸³ jury could not have been led to believe therefrom that the court intended to, or did, convey to the minds of the jurors his idea of the case. There was, therefore, no error in this.

Appellant next insists that the court erred in refusing to give to the jury the following instruction: "It is not necessary in order to sustain the plea of insanity that the fact of insanity be established by a preponderance of the evidence; but if, upon the whole evidence, the jury entertain a reasonable doubt as to sanity they must acquit"; and in giving an instruction upon the question as follows: "You are instructed that every man is presumed to be sane and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, and unless insanity is established by a fair preponderance of the evidence the presumption of sanity must prevail."

This raises the principal question in the case and the one upon which the appellant apparently relies. Able counsel upon both sides have exhaustively treated the subject in their briefs, and brought to our attention adjudicated cases from nearly all of the states of the Union, and from the supreme court of the United States. The rule contended for by the appellant is sustained by the supreme court of the United States, and by the highest courts of the following states: Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New

York, Tennessee, Vermont and Wisconsin—in the latest cases cited, as follows: *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. Rep. 353, 40 L. ed. 499; *Armstrong v. State*, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; *Jamison v. People*, 145 Ill. 357, 34 N. E. 486; ⁴⁹⁴ *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *People v. Finley*, 38 Mich. 482; *Ford v. State*, 73 Miss. 734, 19 South. 665, 35 L. R. A. 117; *Furst v. State*, 31 Neb. 403, 47 N. W. 1116; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Moett v. People*, 85 N. Y. 373; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Revoir v. State*, 82 Wis. 295, 52 N. W. 84; while the highest courts of the following states maintain the rule that, where insanity is set up as a defense in a criminal case, it must be established by a preponderance of the evidence: Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, and West Virginia—in the cases cited as follows: *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 South. 854; *McKenzie v. State*, 26 Ark. 334; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *State v. Hoyt*, 46 Conn. 330; *State v. Cole*, 2 Penne. (Del.) 344, 45 Atl. 391; *Ryder v. State*, 100 Ga. 528, 62 Am. St. Rep. 334, 28 S. E. 246, 38 L. R. A. 721; *State v. Larkins*, 5 Idaho, 200, 47 Pac. 945; *State v. Trout*, 74 Iowa, 545, 7 Am. St. Rep. 499, 38 N. W. 405; *Moore v. Commonwealth*, 92 Ky. 630, 18 S. W. 833; *State v. Parks*, 93 Me. 208, 44 Atl. 899; *Commonwealth v. Eddy*, 7 Gray, 583; *State v. Grear*, 29 Minn. 221, 13 N. W. 140; *State v. Bell*, 136 Mo. 120, 67 S. W. 823; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 778; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680, 45 N. E. 6, 39 L. R. A. 737; *Commonwealth v. Woodley*, 166 Pa. St. 463, 31 Atl. 202; *State v. Alexander*, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; *Carlisle v. State* (Tex. Cr. ⁴⁹⁵ App.), 56 S. W. 365; *People v. Dillon*, 8 Utah, 92, 30 Pac. 150; *Dejarnette v. Commonwealth*, 75 Va. 867; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. The rule in England is followed by the last named class of states. In the states of Oregon and Louisiana the defendant is required by statute to prove insanity beyond a reasonable doubt. The question presented here was before the supreme court of the territory in *McAllister v. Territory*, 1 Wash. Ter. 360. The court there said: "The rule of law as to the burden of proof in criminal cases we all agree is this: The

burden is on the territory to make out every material allegation in the indictment beyond all reasonable doubt. The learned judge who tried the case in the district court repeatedly, in the instructions given on his own motion, and in those asked on the part of the defendant, told the jury that such was the rule of law. The force and effect of this rule cannot be destroyed by any action of the prosecuting officer so far as the facts constituting the *res gestae* are concerned. Part of the facts included in the *res gestae* may be developed by the territory, and part by the defense, but still the rule is the same. The defendant is entitled to the instruction that the jury must be satisfied of his guilt beyond all reasonable doubt on all the facts so put in evidence, and so the jury were told, except as shown above. And we are satisfied that so far as the facts attending the killing are concerned—at least so far as these facts are included in the *res gestae*, that the burden of proof never shifts. This is as true of the defense of insanity under the limitations stated above, as of any other defense. But if insanity is set up as a separate and distinct defense, and its proof does not consist of the facts attending the killing, then the proof must be made out by the defendant, the legal presumption of sanity being sufficient for the indictment in the absence of evidence to the contrary.”

This case is claimed by the appellant as an authority in his favor. It is also claimed by the respondent as an authority in favor of the state. The opinion is to the ⁴⁹⁸ effect that when the proof of insanity is made as a part of the *res gestae*, the burden of proving insanity is not upon the state; but where the proof does not consist of facts attending the killing, then the burden of proving insanity is upon the defendant. It will be readily seen, therefore, why each side of this controversy claims the case as an authority in its favor. But it is difficult to imagine a case where the slayer is insane and where the proof of insanity is not a part of the *res gestae*, but is independent of the facts attending the killing. The court, however, in that case sustained the conviction upon an instruction substantially as in this case, because it was held that the facts did not warrant any instruction upon the question of insanity, observing: “The world has had quite enough of that kind of insanity which commences just as the sight of a slayer ranging along the barrel of a pistol, marks a vital spot on the body of the victim, and ends as soon as the bullet has sped on its fatal mission.”

It will be seen, by an examination of the authorities hereinbefore cited, that the cases in the different states are in ir-

reconcilable conflict as to the quantum of proof upon the question of insanity. All, however, concede that the presumption of sanity prevails, and that there must be some evidence to remove this presumption. In the first class of cases, it is held that, where the evidence raises a reasonable doubt as to the sanity of the defendant, he must be acquitted; in the other, that a reasonable doubt is not sufficient, but the defendant must establish insanity by a preponderance of the evidence. In the first class named, the reason for the rule is that the presumption of innocence always attends an accused person, and that the burden of proving all the elements of the offense rests upon the state and never shifts; that, when the defendant's sanity is put ⁴⁹⁷ in issue, the state must prove it beyond a reasonable doubt, because, without a mind capable of crime, there can be no crime committed; and, therefore, if the jury entertain a reasonable doubt as to the sanity of the accused, it follows that they are in doubt as to his guilt.

The reason for the rule adopted in the other class of states is that sanity is the natural condition of man, and therefore every man is presumed sane until the contrary is made to appear; that, when the commission of a crime is admitted or clearly proven, and insanity is alleged as a defense, it, being an independent affirmative defense and opposed to the natural and usual order of things, must be established by a preponderance of the evidence. Another reason given is that the presumption of sanity is necessary for the well-being, safety, and protection of society, and for the administration of justice, and neutralizes the presumption of innocence upon which the rule of reasonable doubt rests, and therefore leaves the accused, when asserting his insanity, to show the fact by a preponderance of the evidence. Another reason for the rule is that it is the only safe rule for society, while it is also just to the accused.

The distinction between the quantum of proof necessary to raise a reasonable doubt and that necessary to constitute a fair preponderance of the evidence is more fanciful than real. When evidence is sufficient to raise a reasonable doubt, as such doubt is usually defined and understood, it may also be said in a sense to preponderate. The distinction, therefore, while it may be fruitful of philosophical and theoretical discussion, is of little practical value. Insanity, when it exists as a fact, is easily and readily proved. When it does not exist in fact, it is easily feigned and difficult to disprove. For this latter reason it is the usual ⁴⁹⁸ defense when there is no other. It is no injustice to

a defendant to presume that he is sane, and to require him to prove the unnatural condition of mind, which he alleges as a defense for a crime admitted, and to relieve him from a penalty justly due to men in their natural condition. Notwithstanding the weighty reasons advanced by the learned courts in the class first named, we desire to adopt the rule laid down by the trial court in this case.

Appellant assigns error upon the instruction of the court given as follows: "If you find beyond a reasonable doubt that the defendant committed the crime as charged in the information, then I charge you that it is your duty to render a verdict of murder in the first degree"—upon the ground that the instruction eliminated the defense interposed. If this instruction is to be read as standing alone, it would be subject to the criticism offered. But all of the instructions must be read together, and, when so read, it was not error, because the court fully and fairly instructed the jury upon the defenses interposed by the defendant. This instruction simply told the jury that the information charged murder in the first degree, which was correct.

Other instructions requested by the appellant—defining the duty of the jury, reasonable doubt, circumstantial evidence, and the degree of insanity necessary to acquit—were refused by the court. These questions were all fully and correctly covered and explained to the jury by other instructions which were given; for that reason it was not necessary to give the instructions requested, even though they stated correct principles of law. A further discussion of them is not necessary.

Appellant's last assignment is that the court erred in refusing to grant a new trial by reason of the insufficiency ⁴⁹⁹ of the evidence to justify the verdict. We have carefully examined all the evidence in the case, and, while it is true that no one saw the killing or had an opportunity to see it, except the defendant, the circumstances surrounding the killing are so conclusive that there can be no possible doubt that the defendant did it; that he had prepared for it by taking an ax into the room some time before the deed was done; and that, while Leila Page was asleep or in a drunken stupor, he crushed her skull with the ax and then cut her throat; that he then, with the small penknife—probably the same one used on her—and a swallow of carbolic acid, attempted to take his own life; and thereupon became unconscious for a time. There is no evidence of insanity except his own statement hereinabove quoted, and except statements of two or three witnesses to the effect that the day before the

tragedy the defendant "looked wild," that he acted "nutty," and "like he was going to get on a drunk." The evidence shows that the defendant was jealous of the deceased, but it is not sufficient to create any sort of a doubt of his sanity; and we have no doubt, upon all the evidence, that, both before and at the time of the crime and afterward, the defendant was as sane as any man can be who will commit so atrocious a crime. The case was fairly tried, and there is no error in the record.

The judgment is therefore affirmed.

Fullerton, C. J., and Hadley, Anders and Dunbar, JJ., concur.

Insanity as a Defense to Crime is discussed in the monographic notes to *Knights v. State*, 76 Am. St. Rep. 83-97; *People v. Hubert*, 63 Am. St. Rep. 100-108. And see the recent case of *State v. Keerl*, 29 Mont. 508, ante, p. 579, 75 Pac. 362. A reference to the note to *Knights v. State*, 76 Am. St. Rep. 92-97, will show that there is no little diversity of judicial opinion on the question of burden of proof when the defense of insanity is set up.

ELLIOTT v. HAWLEY.

[34 Wash. 585, 76 Pac. 93.]

HUSBAND AND WIFE—Wife's Separate Property.—If a married woman living with her husband, takes a half interest in a contract to work a mine on shares, hires a man to do half the work, and pays him out of her share of the clean-up, while she personally supervises the work, the net profits of her mining enterprise are her separate property, under a statute exempting property acquired by a married woman "by her own labor," from the debts or contract liabilities of her husband. (p. 1019.)

HUSBAND AND WIFE—Wife's Separate Property—Partnership Property.—If money acquired by a married woman in one state as a member of a partnership there becomes her separate property, and is brought into another state and deposited as the funds of such partnership, her share thereof remains her separate property, and real estate there purchased by her and paid for by a check of such partnership, in a sum less than her share of such deposit, is not subject to her husband's separate debt. (p. 1020.)

HUSBAND AND WIFE—Wife's Separate Property—Restrictions Against Partnerships formed by husband and wife are intended only to protect the wife against her husband's separate debts, and not to deprive her of her separate property. (p. 1020.)

HUSBAND AND WIFE—Wife's Separate Property—Commingle of Funds.—If the amount of money invested by husband and wife in a joint enterprise is definite as to the amount advanced by each, and yields a definite income or increase, there is no such commingling of their separate property, as to cause it to lose its identity. (p. 1021.)

Embree & Cole and C. S. Preston, for the appellants.

Carr & Preston, for the respondents.

586 HADLEY, J. The purpose of this action is to subject certain real estate in the city of Seattle to execution sale. The suit was brought by the appellant, as administrator of the estate of E. B. Earle, and against the respondents, who are husband and wife. On the third day of June, 1898, respondent Frank R. Hawley executed his promissory note for the sum of one thousand dollars, payable to the order of one Shedd, who afterward transferred it to the said E. B. Earle, the latter being now deceased. Said Hawley claims that the note was given merely as an accommodation to said Shedd to enable him to raise some money, but that question is immaterial here, since a judgment founded upon the note was rendered in favor of the administrator of Shedd's deceased assignee, and against said respondent, in the superior court of King county, on the sixth day of January, 1902. There was no appeal from said judgment, and it is sought here to have it declared that the judgment is a lien upon the said real estate, and that the land is subject to levy and sale for the satisfaction of the judgment.

At the time said note was made the said Frank R. Hawley was unmarried. Afterward, on the ninth day of **587** July, 1898, he and his correspondent became husband and wife. The obligation represented by the note was therefore the separate debt of Frank R. Hawley. The real estate in controversy was conveyed to the respondent Katherine W. Hawley on or about October 24, 1899, and the complaint alleges that it was purchased with the separate funds of the husband. It is averred that the conveyance was made to the wife without consideration paid or agreed to be paid by her, and in furtherance of a fraudulent scheme and design, on the part of both husband and wife, to cheat, delay and defraud the creditors of the husband. The answer denies said allegations, and affirmatively alleges that the property was purchased with the separate funds of Katherine W. Hawley, and that the same is her sole and separate property.

A trial was had before the court without a jury. The findings of the court cover many details, and, while we deem it unnecessary to set them all out, yet a somewhat extended statement of the facts found will lead to a better understanding of the case. The court found that respondent, Frank R. Hawley, had not been a resident of the state of Washington at any time during the ten years last past, and that respondent, Katherine

W. Hawley, has never been a resident of California, and thereafter, in the autumn of 1898, living together as husband and wife, they took up their abode at or near claim No. 9 Above Discovery, on Little Minook creek, Alaska; that said claim No. 9 was owned by a corporation in which said Frank R. Hawley was a stockholder; that about said time said Hawley and his uncle, one Reasoner, planned to take a lay, or contract for working on shares, on a portion of said claim; that thereafter said Hawley was made manager of ⁵⁸⁹ said corporation, and of its operations on said claim, and said lay was then taken by said Reasoner and Katherine W. Hawley in equal shares.

It was also found that the work upon the lay was performed by said Reasoner and another, the latter being paid for his services from Mrs. Hawley's share of the clean-up; that Mrs. Hawley did not perform actual manual labor upon the claim, but that she was frequently on said lay ground while the work was progressing, inspected the same, and consulted with her partner Reasoner concerning the work; that, as a result of the work upon the lay and the clean-up therefrom, Mrs. Hawley's net share of the proceeds was about four hundred and fifty dollars, which sum, by her authority and direction, was, by her husband, invested for her in the spring of 1899; that said investment was in a partnership known as Mitchell & Co., composed of the two respondents and one Archie Mitchell; that the husband invested in the partnership an equal amount of his own funds, and that said Mitchell owned a half interest in the partnership, leaving a one-fourth interest each to Mr. and Mrs. Hawley; that the partnership operations were on Anvil creek, near Nome, Alaska, and the gold representing the partnership's share of the clean-up was brought to the United States assay office at Seattle, Washington, in one entire lot, converted into money, and deposited in a bank at Seattle to the credit and in the name of Mitchell & Co.; that the purchase price of said real estate was paid by a check on said deposit, drawn by respondent, F. L. Hawley, in the firm name of Mitchell & Co., in favor of E. M. Carr, who was acting as attorney and agent for Mrs. Hawley in the purchase of the lots; that it was understood, and in good faith believed, both by Hawley and his wife, that the money so invested was the separate money of Mrs. Hawley. ⁵⁸⁹ The findings also set out in full a number of sections from Hill's Annotated Laws of Oregon, as being, by virtue of the United States statutes, in full force and effect throughout the ter-

ritory of Alaska until June 6, 1900. Among other provisions of said statutes are the following:

"Sec. 2992. The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him.

"Sec. 2993. The property, either real or personal, acquired by any married woman during coverture, by her own labor, shall not be liable for the debts, contracts or liabilities of her husband, but shall, in all respects, be subject to the same exceptions and liabilities as property owned at the time of her marriage or afterward acquired by gift, devise or inheritance."

"Sec. 2873. Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, and except as herein otherwise declared they are not liable for the separate debts of each other, nor is the rent or income of such property liable for the separate debts of the other."

"Sec. 2997. Contracts may be made by the wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."

It was further found that, at the time said conveyance was made to Mrs. Hawley, her husband was wholly solvent, and that he then and afterward had on deposit, in the Washington National Bank of Seattle, moneys belonging to him largely in excess of his total indebtedness. From the facts found the court concluded that the lands purchased became the sole and separate property of Mrs. Hawley, ⁵⁹⁰ and that her husband has never at any time had, and has not now, any interest therein. Judgment was entered denying the demand of the complaint and dismissing the action. The plaintiff has appealed.

Errors are assigned upon the court's findings, but we are satisfied, after reading the evidence, that the facts as found by the court are sustained by the evidence submitted. If there was no error in the conclusion that the purchase money for the lots involved—acquired in the manner it was—became the separate money of Mrs. Hawley, then the judgment was right. It will be observed by reference to sections 2992 and 2993 of the Oregon statutes quoted above, and which were in force in Alaska when Mrs. Hawley was engaged in her enterprises there, that neither real nor personal property, acquired by a married

woman during coverture by her own labor, shall be liable for the debts of her husband, but shall be absolutely her own, and subject to her disposal. Under the evidence and the findings, Mrs. Hawley agreed with Reasoner to work the lay above mentioned on shares. This she had a legal right to do, under the terms of section 2997, *supra*.

Appellant, however, insists that the proceeds of the lay work could not have become her separate property unless she had actually performed manual labor upon the claim.* We do not think the words "by her own labor," used in section 2993, *supra*, were intended to be so restricted, but, as suggested by respondents' counsel, that they rather mean, by her own efforts. She deliberately agreed with Reasoner to work a lay, and to pay for the services of a man as a helper in her place. She was often upon the ground to see how the work progressed, and advised with Reasoner about it. The helper was paid from her share of the proceeds. We think, under such circumstances, that the ⁵⁹¹ money was acquired by her own exertions, and that, under the law, it became her separate money. The court in its findings traced that money to a subsequent investment, and found that it yielded yet more. The findings do not disclose the amount, but the evidence shows that her share of the proceeds of such investment in the Nome partnership enterprise was more than four thousand dollars, and that said sum was placed in the Seattle bank, and from it came the money which purchased the lots in question. Thus the money was acquired by Mrs. Hawley in Alaska under laws which made it her separate property, and when it was brought to Seattle it still remained such.

Appellant, however, insists that under *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, the wife could not enter into a contract of partnership with her husband. It will be remembered that the husband and wife and one Mitchell composed the Nome partnership of Mitchell & Co. The rule discussed and decided in the case cited is for the protection of the wife's separate property, to prevent her from entering into such engagements with her husband that her separate property may be taken from her in satisfaction of his debts. The purpose of the rule is, not to work a loss to the wife, but to prevent it. In this instance money which went into the Nome enterprise was shown to be her separate money. It yielded a large percentage of increase. The wife was entitled to the legitimate increase upon the investment of her separate money. It is further urged that these

funds have been commingled with those of the husband, and that, under *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398, they are not separate funds of the wife. There has never been a commingling which leads to any confusion. The amount invested by each was a definite sum; ⁵⁹² each sum yielded its definite increase, and the whole of each has at all times been easily ascertainable. This was not confusion, and the separate interests did not lose their identity as such.

The judgment is affirmed.

Fullerton, C. J., and Mount, Anders and Dunbar, JJ., concur.

Profits Produced by the Skill and Labor of a Married woman in the use of her separate estate while living with her husband are a part of such estate, and not earnings belonging to him: Trapnell v. Conklyn, 37 W. Va. 242, 38 Am. St. Rep. 30, 16 S. E. 570. See, too, *Parrett v. Palmer*, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713.

A Husband and Wife may be Partners in many of the American commonwealths: Hoaglin v. Henderson & Co., 119 Iowa, 720, 97 Am. St. Rep. 335, 94 N. W. 247; *Burney v. Savannah Grocery Co.*, 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915. See, however, *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 35 Am. St. Rep. 105, 19 S. W. 747, 16 L. R. A. 526; *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919, and note.

ABBOTT v. THORNE.

[34 Wash. 692, 76 Pac. 302.]

APPELLATE PRACTICE.—In a case tried and determined upon the merits, the plaintiff, as the prevailing party, may raise the objection upon appeal that the action cannot be maintained in any event. (p. 1022.)

MALICIOUS PROSECUTION of Civil Action.—An action will not lie for the prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person, or attachment of the property of the defendant, and no special injury sustained which would not necessarily result in all prosecutions for like causes of action. (pp. 1022, 1023.)

Stile & Doolittle, for the appellant.

Bogle & Richardson and Bates & Murray, for the respondents.

⁵⁹³ **DUNBAR, J.** This is an action by appellant against the respondents for a conspiracy to maliciously prosecute. The action is based upon allegations set forth in the case entitled,

"T. B. Deming, plaintiff, v. Pacific Investment Co., J. H. Easterday, T. O. Abbott, L. R. Wheeler, Commercial Investment Co., National Bank of Commerce of Tacoma, and M. J. Adams, defendants." This case came to this court under the title of "William H. Opie, as administrator, respondent, v. Pacific Investment Co. et al., appellants," reported in 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778; a judgment of reversal having been obtained in this court by the appellant in the case at bar, and the allegations which the appellant claims were malicious having been found by this court not to be true. The cause proceeded to trial, and upon the conclusion thereof the respondents requested the court for a peremptory instruction to the jury for a verdict in their behalf, which was granted. The ground upon which the motion was granted it is not necessary to discuss, under our view of subsequent questions, which are determinative of the case.

A great many questions are presented by the record and in the briefs of counsel, but preliminary to all others is the question whether or not this case can be maintained. It is insisted by the appellant that this question cannot be raised by the respondents, inasmuch as they prevailed in the court below; but it is too evident for discussion that it would be a foolish proceeding, on the part of this court, to reverse a case and send it back for a new trial, when it would finally have to be determined that the action would not lie; and the view we take of this question renders a discussion of the other proceedings involved unnecessary. On the main question, whether ⁶⁸⁴ an action for malicious prosecution will lie where there is no arrest of the person or attachment of the property, there is some conflict of authority, and it has been held by Judge Hanford, in *Wade v. National Bank of Commerce*, 114 Fed. 377, that such an action would lie. Also, in *McCormick Harvester Mach. Co. v. Willan*, 63 Neb. 391, 93 Am. St. Rep. 449, 88 N. W. 497, 56 L. R. A. 338, a Nebraska case, the contrary rule announced in *Rice v. Day*, 34 Neb. 100, 51 N. W. 464, was practically overruled.

The leading case sustaining this doctrine is *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558, where the doctrine was announced that, for the malicious prosecution of a civil action without probable cause, plaintiff was answerable to the defendant, though the latter was not arrested nor his rights interfered with in any manner. This is a North Dakota case, and presents that view of the law very forcibly and clearly, and the conflicting cases are discussed with great precision and

power. But, notwithstanding the able opinion in this case, we are forced to the conclusion, from an investigation of authorities and a consideration of the principles involved, that the contrary doctrine is well established, and that an action will not lie for the prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person or attachment of the property of the defendant, and no special injury sustained, or injury which is not the necessary result in such suits. And this doctrine we think is sustained, not only by the overwhelming weight of numerical authority, but by the overwhelming weight of reason.

The right of free allegations in a pleading has always been considered privileged. Courts are instituted to grant relief to litigants, and are open to all who seek remedies ⁶⁹⁵ for injuries sustained; and unnecessary restraint, and fear of disastrous results in some succeeding litigation, ought not to hamper the litigant or intimidate him from fully and fearlessly presenting his case. If the charges prove to be unfounded, costs have been prescribed by the legislature as the measure of damages. Prior to the time when costs were allowed to the prevailing party, there was more reason for sustaining actions on the case; and, as a rule, the costs and expenses incident to an unsuccessful lawsuit will be sufficient to restrain actions which are founded purely on malice. While it is no doubt true that, in some instances, the peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burdens the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effect, and accords in the greatest degree with public policy. If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another. For the failure to establish the fact alleged that an allegation in the original complaint was malicious, might well warrant the conclusion that the allegation in the second case, charging malice in the allegations of the first action, was malicious, and so on *ad infinitum*.

In *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870, it was held that no action would lie for the recovery of the damages sustained by the institution and prosecution of a civil action of malice, and without probable cause, when there had been no arrest of the person nor seizure of the property of the defendant, and no special injury sustained which would not necessarily result in all prosecutions for like causes of action. In that case, in the argument, it was said: "If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it."

It seems to us that there is much common sense in this observation, for the affirmative allegations of an answer are as liable to contain malicious statements as the affirmative allegations of a complaint; and the result would be, if the doctrine contended for were upheld to its logical conclusion, that the plaintiff in an action would be entitled to damages for the unsupported allegations of an answer; for there is as much publicity given to an answer in an action as there is to a complaint, and damages in one case would be just as liable to be incurred as in the other. The same rule is announced in *Smith v. Hintz*, 67 Iowa, 109, 24 N. W. 744, and in *McNamee v. Minke*, 49 Md. 122, where the court, in summing up an argument which holds that the action will not lie, says: "Otherwise, parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

In *Mayer v. Walter*, 64 Pa. St. 283, it is said: "But for this rule, the termination of one suit would be, in a multitude of instances, the signal for the institution ⁶⁸⁷ of another, in which the parties would be reversed; and the process might be renewed indefinitely, in contravention of the maxim '*Interest reipublicae ut sit finis litium.*'"

It was decided in *Bitz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233, that a civil action, in all its parts, is a claim of right, and is pursued only at the peril of costs, if not sustained, subject to the qualifications that the defendant has been arrested without cause and deprived of his liberty, or made to suffer other special grievances. The same doctrine is specifically announced in *Supreme Lodge etc. v. Unverzagt*, 76 Md. 104, 24 Atl. 323;

Potts v. Imlay, 4 N. J. L. 330, 7 Am. Dec. 603; Terry v. Davis, 114 N. C. 27, 18 S. E. 943; Mitchell v. Southwestern R. R. Co., 75 Ga. 398; Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245; Smith v. Michigan Buggy Co., 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569; Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433, 56 N. E. 198; Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 87 N. W. 804, 56 L. R. A. 261; Tunstall v. Clifton (Tex. Civ. App.), 49 S. W. 244; McCord-Collins Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; and many other cases, a tabulated statement of which would not be of assistance.

But, in addition to outside authority, this court has spoken with no uncertain sound on this subject, and in a case brought by the parties to this action in *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376, it was held that allegations contained in pleadings filed in a court of competent jurisdiction are absolutely privileged, where they are relevant and pertinent to the cause, regardless of their falsity or maliciousness. In the discussion ⁶⁹⁸ of this case it was said by the writer of the opinion, Judge Gordon: "We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, Were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith? The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may, in some instances, afford an immunity to the evil-disposed and malignant slanderer' [citing *Bartlett v. Christilf*, 69 Md. 219, 14 Atl. 518]. It cannot be doubted that it is a privilege liable to be abused, and its abuse may lead to great hardships; but to give legal sanction to such suits as the present would, we think, give rise to far greater hardships."

It is true that this was an action for libel, but the principle involved is exactly the same as is involved in this case, although the form of the action was slightly different. Also, in *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650, it was said by Judge Stiles, who wrote the opinion: "While the issuance of an attachment may do injury to this mercantile character and credit of a debtor, it is, in that respect, not different from other judicial proceedings. If the allegations of the affidavit are in one case libelous, and tend to break down

the confidence theretofore reposed in the defendant, they are no more so than would be a complaint in a suit for money obtained by alleged false pretenses. And so this kind of injury may be brought about as effectually where no property at all has been taken under the writ. The commencement of an ordinary suit upon a promissory note has fully as great a tendency to impair credit as any other proceeding, for the presumption is that a business man will take care of his notes at least, if he has any regard for his standing in the commercial world; and, if he cannot take care of ~~the~~ them so that he has to be sued, the inference most naturally is that he is weak in resources, and, therefore, not a safe person to credit. But the note may be forged, or not due, or paid, or there may be counterclaims or good defenses so that the suit is totally unjustifiable. But does anyone sue for damages to credit growing out of such proceedings? Not at all, because they are privileged, being proceedings in courts of justice. And so we think this attachment proceeding, and all allegations of fraud made herein, although they may injure the character, reputation or credit of the defendant, are in the same way privileged, and not to be recovered for."

It is said by the appellant that this case is not in point because it was simply decisive of a measure of damages. But the decision on the measure of damages was based upon the theory that the allegations in the complaint were privileged, and that no action would lie for that reason; and it would certainly be inconsistent for this court to hold that damages to reputation and character could be recovered in an action where no attachment had issued, and that they could not be recovered where the defendant's property had been attached, as in the case of *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650, just discussed.

We think the principles announced by this court in the cases just cited would preclude a recovery in this cause, and we are not disposed to retreat from the positions there taken. In this litigious age, when speculative lawsuits are rapidly multiplying, we think that considerations of sound public policy will not justify courts in announcing a doctrine which tends to encourage this character of litigation.

The judgment is affirmed.

Fullerton, C. J., and Hadley, Mount, and Anders, JJ., concur.

The Malicious Prosecution of civil actions is discussed in the monographic note to McCormick Harvesting Co. v. Willan, 93 Am. St. Rep. 454-474. A reference to pages 466-469 of this note will show the conflict of authority on the question whether an action for the malicious prosecution of a civil action will lie when there has been no seizure of the person or property of the defendant therein. On the malicious prosecution of criminal charges, see the monographic note to Ross v. Hixon, 26 Am. St. Rep. 127-164.

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1. ATTACHMENT cannot be Maintained upon a complaint which does not state facts sufficient to constitute a cause of action. (Mont.) Porter v. Plymouth Gold Min. Co., 569.

2. ATTACHMENT.—A Bond Conditioned to be Void if the principal therein performs his contract, is not a contract by the sureties for the "direct payment of money" within the meaning of a statute authorizing an attachment in an action upon such a contract. (Mont.) *Ancient Order of Hibernians v. Sparrows*, 563.

3. ATTACHMENT—Sales.—Caveat Emptor applies to the purchaser at a sheriff's sale under attachment, and he acquires no greater title than the defendant in attachment had at the time of the sale. (Ala.) *Milner etc. Co. v. De Loach etc. Co.*, 63.

See *Trover*, 4.

BANKRUPTCY.

1. BANKRUPTCY.—Effect of Discharge in bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a valid lien has attached and which is not expressly annulled by the bankruptcy statute. (Ill.) *Mallin v. Wenham*, 233.

2. ASSIGNMENT OF WAGES—Bankruptcy.—A discharge in bankruptcy does not release a prior assignment of wages to be earned in future, nor destroy the lien created by such assignment. (Ill.) *Mallin v. Wenham*, 233.

BANKS AND BANKING.

1. BANKING.—Notwithstanding the Deposit of Moneys Jointly in the Names of A and B, they may be proved, by the testimony of the latter, to belong to him exclusively. (N. Y.) *Matter of Barefield*, 814.

2. BANKS AND BANKING—Negotiable Instruments—Negligence of Indorsee.—If a bank by mistake informs a person that it holds a certain sum of money on deposit to his credit, and he shows the letter so informing to a third person, and requests from the bank a draft for the amount of the deposit, which, when received he indorses to such third person, who pays him the amount of the deposit, as between such third person and the bank the latter must stand the loss. (Utah.) *Heavey v. Commercial Nat. Bank*, 966.

3. BANKS AND BANKING—Wrongful Dishonor of Depositor's Check—Measure of Damages.—In the absence of malice, oppression or bad motive, the wrongful refusal of a bank to honor its depositor's check makes it liable only for compensatory damages and not for punitive damages, or damages for humiliation or mortification of depositor's feelings. (Ky.) *American Nat. Bank v. Morey*, 379.

4. BANKS AND BANKING—Dishonor of Check—Element of Damages.—If a bank wrongfully dishonors its depositor's check, without malice, the fact that such depositor had a nervous chill when her check was protested and returned, cannot be considered in determining the damages due her from such transaction. (Ky.) *American Nat. Bank v. Morey*, 379.

5. BANKS AND BANKING—Dishonor of Check—Measure of Damages.—If a bank wrongfully dishonors a depositor's check, without malice, the depositor is entitled to recover only compensatory damages for time lost, expenses incurred, loss of business, or other loss sustained by reason of the dishonor of the check. (Ky.) *American Nat. Bank v. Morey*, 379.

See *Gifts*, 5; *Forgery*; *Trusts*, 1.

BENEFIT SOCIETIES.

See Insurance.

BICYCLES.

See Highways, 5.

BILLS AND NOTES.

1. MORTGAGE and Note Should be Construed Together.—A note and mortgage executed and delivered as one transaction will be construed together; provisions in the mortgage relating to the indebtedness itself and attempting to modify the terms of the note will be construed with the note. (Neb.) *Consterdine v. Moore*, 620.

2. NEGOTIABLE INSTRUMENTS—Negligence of Drawer.—If the drawer of a bill of exchange, draft or check has been induced through fraud to deliver it to an impostor, believing him to be the real person named therein, and such impostor negotiates the instrument, and receives payment thereon from an innocent third person, as between the bona fide holder and drawer, the latter must stand the loss. (Utah.) *Heavey v. Commercial Nat. Bank*, 966.

3. NEGOTIABLE INSTRUMENTS—Indorsement in Blank.—One who indorses a note in blank and intrusts it to another to fill up and have discounted for the indorser's benefit, is liable upon it to a bona fide holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was intrusted, notwithstanding that the latter filled it up for, and fraudulently converted it to, a purpose entirely different from that for which he the sender of the note. (N. J. L.) *Mechanics' Bank v. Chardavoyne*, 701.

4. NEGOTIABLE INSTRUMENTS—Indorsement in Blank—Bona Fide Holder.—If a bank receives a note in the regular course of business, in good faith and without notice of any infirmity in it, in payment of an indebtedness due from the person sending it, whose wife has indorsed it in blank, and intrusted it to him to discount for her benefit, the bank thereby becomes a bona fide holder of the note for value, and entitled to protection as such as against the wife of the sender of the note. (N. J. L.) *Mechanics' Bank v. Chardavoyne*, 701.

5. BILLS AND NOTES.—Payment to the Original Payee of a non-negotiable note, without notice of any transfer thereof, discharges the paper. (Neb.) *Consterdine v. Moore*, 620.

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BURGLARY.

BURGLARY.—Possession of Recently Stolen Goods, in the absence of a satisfactory explanation of the source of such possession, justifies a finding that the possessor broke and entered the building from which they were stolen. (Iowa.) *State v. Raphael*, 334.

Note.

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CARRIERS.*Stations and Depots.*

1. **RAILROADS**—Defective Station Platform.—A woman who goes to a railway station in the evening after business hours, the depot being closed, the lights extinguished, and the agent gone, to find her husband, who has gone there to attend to some shipping, assumes the risk of the platform being unsafe. (Minn.) *Sullivan v. Minneapolis etc. Ry. Co.*, 414.

2. **RAILWAY DEPOT**—Duty to Persons There Near Train Time.—While a railway company cannot be expected to be continuously on its guard as against loiterers and trespassers, yet it should anticipate that its station-house and depot grounds may be used as a place of meeting by people for various lawful purposes at or about the time of the arrival and departure of trains. (Minn.) *Klugherz v. Chicago etc. Ry. Co.*, 384.

3. **RAILWAY DEPOT**—Duty to Persons There—Time as Affecting.—The time, in respect to the arrival of trains, at which a person visits a depot is to be taken into consideration in determining the duty owed him by the railway company. But it is not possible to lay down a general rule as to the limit of time under all conditions within which one shall be restricted to visit such premises at his peril; it is a question of fact to be determined according to the circumstances of each particular case. (Minn.) *Klugherz v. Chicago etc. Ry. Co.*, 384.

4. **RAILWAY STATION**—Duty to Persons Meeting There.—As toward one who goes to a depot an hour and ten minutes before train time in good faith to meet a person on a matter of business who, he believes, will take the train, the railway company, in unloading a gravel train near by, owes the duty of ordinary care. (Minn.) *Klugherz v. Chicago etc. Ry. Co.*, 384.

Tickets.

See Injunctions, 3-7.

5. **RAILROADS**—Power to Issue and Affix Conditions to Special Tickets.—A railroad company may issue special tickets, based upon reduced rates, make them nontransferable, and valid only in the hands of the original purchaser, and such tickets may be limited as to time, or as to occasion, or they may be unlimited as to time or occasion and the original purchaser of such ticket cannot assign or transfer it, or any rights whatever thereunder, to any third person. (Mo.) *Schubach v. McDonald*, 452.

6. RAILROADS—Rights Under Special Nontransferable Tickets.—The purchaser of a special railroad ticket at reduced rates, non-transferable on its face cannot sell or transfer it to a third person to be used by him or another, and if he does the railroad company may invoke the aid of a court of equity to cancel the contract because of the fraud thus perpetrated, or if the ticket is used by another, it may sue for damages for a breach of the contract. (Mo.) *Schubach v. McDonald*, 452.

Passengers.

7. NEGLIGENCE.—Passengers Never Assume the risk of the carrier's negligence. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

8. NEGLIGENCE.—Passengers Assume the Ordinary Risks incident to the act of traveling, but not an added danger caused by the negligence of the carrier. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

Stopping at Crossing.

9. RAILWAY, Liability of to Passenger for not Stopping at Crossings.—If an engineer is not liable to a passenger for not stopping at a crossing, as required by the code of Iowa, the corporation in whose employ he is cannot be held liable. (Iowa.) *State v. Chicago etc. Ry. Co.*, 254.

Connecting Carriers.

10. CONNECTING CARRIERS—Presumption of Negligence.—If apples, shipped over connecting railroads, were in good condition when accepted by the first carrier but damaged by frost when delivered by the last carrier, the burden is on it to show that the loss did not result from any cause for which it was responsible, although the apples were transported in through sealed cars. (Minn.) *Beede v. Wisconsin Cent. Ry. Co.*, 390.

Note.

Carriers, connecting, baggage, presumption as to place of loss of or injury to, 397.

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CHATTEL MORTGAGE.

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CONCEALED WEAPONS.

See Weapons.

CONFLICT OF LAWS.

See Judgments, 6-8.

CONFUSION OF GOODS.

1. CONFUSION OF GOODS is the Willful and Fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of the latter, in such a way that they cannot be separated and distinguished. (Pa. St.) *Stone v. Marshall Oil Co.*, 904.

2. CONFUSION OF GOODS—Doctrine and Effect.—Although such a term as "confusion of goods" is generally used, there is in fact, properly, no such doctrine as a "confusion of goods." There is a fact of confusion of goods, which if committed with a fraudulent motive, subjects the transaction to an inflexible rule, that the wrongdoer shall not profit by, nor the innocent person suffer from, the wrong. (Pa. St.) *Stone v. Marshall Oil Co.*, 904.

3. CONFUSION OF GOODS.—If a Natural Gas Company fraudulently commingles gas from leased property with gas from other properties under its control, keeping no account thereof, it is bound to account to the owner of the leasehold, who is entitled to one-fourth of the profits therefrom, for one-fourth of the profits from the whole gas confused. (Pa. St.) *Stone v. Marshall Oil Co.*, 904.

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CONSTITUTIONAL LAW.

In General.

1. **CONSTITUTIONAL LAW.**—Laws may be Declared Invalid, although not repugnant to any expressed restriction contained in the state constitution. (Ky.) *Lexington v. Thompson*, 361.

2. **CONSTITUTIONAL LAW.**—The Court Inclines to so Construe a Statute as to validate it. (N. Y.) *People v. Lochner*, 773.

3. **CONSTITUTIONAL LAW.**—Statutes will not be Declared Void simply because, in the opinion of the court, they are unwise, or opposed to justice and equity. Statutes must in some way violate constitutional provisions in order that they may be declared void. (Utah.) *Block & Griff v. Schwartz*, 971.

Police Power.

4. **CONSTITUTIONAL LAW.**—Police Power may be exercised to promote the safety, health, comfort and welfare of society, and to sustain legislation as a proper exercise of such power, it must have reference to some such end. (Utah.) *Block & Griff v. Schwartz*, 971.

5. **CONSTITUTIONAL LAW.**—Exercise of Police Power.—Neither the legislature nor the executive can, under the guise of police regulation, arbitrarily or unjustly, without good cause, restrict or infringe upon the property rights or the liberty of any person within the protection of the constitution, and whenever the legislature undertakes to determine what is a proper exercise of the police power, its determination is a subject of judicial scrutiny. (Utah.) *Block & Griff v. Schwartz*, 971.

Labor Laws.

6. **CONSTITUTIONAL LAW.**—The Fact that a Provision of a Statute is Part of the Labor Law does not establish that it is not also a health law, if its provisions are germane to that subject, and if sustainable as a health law, it cannot be declared unconstitutional because made a part of a statute purporting to regulate labor. (N. Y.) *People v. Lochner*, 773.

7. CONSTITUTIONAL LAW—A Statute Limiting the Hours of Labor of Employés in a Bakery to sixty hours in each week and ten hours in one day is constitutional, because it must be assumed that its object is to protect the health of such employés. (N. Y.) People v. Lochner, 773.

Regulation of Bakeries.

8. CONSTITUTIONAL LAW—Power to Regulate Bakeries.—It is within the police power of the legislature to so regulate the conduct of the business of carrying on bakeries as to best promote and protect the health of the people. (N. Y.) People v. Lochner, 773.

Sale of Property.

9. CONSTITUTIONAL GUARANTY that No Person Shall be Deprived of life, liberty or property, without due process of law embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political and personal rights, including the right in each subject to purchase, hold, and sell or dispose of his property in the same way that his neighbor may, and of such "liberty" no one can be deprived without due process of law. (Utah.) Block & Griff v. Schwartz, 971.

10. CONSTITUTIONAL LAW—Liberty to Sell Property.—A statute which deprives an owner of his "liberty" to sell his property, or contract in relation thereto, in the same manner as others engaged in the same business may lawfully do, invades his guaranteed constitutional rights, and cannot be upheld. (Utah.) Block & Griff v. Schwartz, 971.

11. CONSTITUTIONAL LAW.—Exercise of Police Power does not justify the enactment of a statute prohibiting solvent merchants from disposing of their stock of goods in bulk without notifying their creditors. (Utah.) Block & Griff v. Schwartz, 971.

12. CONSTITUTIONAL LAW—Statutes Regulating Sale of Stock of Goods in Bulk.—A statute prohibiting, under a penalty, any merchant, whether solvent or insolvent, from selling or disposing of his stock of goods in bulk, without an inventory thereof, and notification to his creditors, and which applies also to persons acting in a fiduciary capacity and under judicial process, and which does not apply to merchants who are not indebted, is unconstitutional as depriving a solvent merchant of his property and liberty to contract without due process of law, and as being class legislation. (Utah.) Block & Griff v. Schwartz, 971.

Class Legislation.

13. CONSTITUTIONAL LAW.—Statutes Which Punish Criminally One Person for the doing of an act which another person in the same line of business may lawfully do, are unconstitutional, as being class legislation, and as a deprivation of property and liberty without due process of law. (Utah.) Block & Griff v. Schwartz, 971.

Forbidding Spite Fences.

14. CONSTITUTIONAL LAW—Spite Fences.—A statute declaring that any structure in the nature of a fence unnecessarily exceeding five feet in height and erected for the purpose of annoying

the owner or occupant of adjoining premises shall be deemed a private nuisance, and providing that an owner or occupant thereby injured in the comfort or enjoyment of his estate may maintain an action for the damages sustained, and designed to prohibit an unnecessary and unreasonable use of land by the owner thereof, is valid, and not an unconstitutional interference with the rights of private property. (N. H.) *Horan v. Byrnes*, 670.

See *Municipal Corporations*, 1, 2; *Railroads*, 6; *Statutes*; *Taxation*; *Weapons*.

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Constitutional Law, sales in bulk, statutes requiring notice to be given of, 986.

CONTRACTS.

1. **CONTRACTS—Conditions.**—If land furnished under an agreement to furnish land necessary for "borrow pits" is not practicable for the work contracted for, the contractor is entitled to recover money necessarily expended in procuring other land practicable for that purpose. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

2. **CONTRACTS, Ratification of.**—A void contract is binding upon neither party, and cannot be ratified. If ratified in form, it is a new contract, and takes effect only from the date of the attempted ratification. (N. Y.) *Blinn v. Schwarz*, 806.

3. **CONTRACTS.**—A Voidable Contract Binds One Party But not the Other, who may ratify or rescind it at pleasure. (N. Y.) *Blinn v. Schwarz*, 806.

4. **CONTRACTS—Avoidance for Fraud or Mistake.**—A condition in a contract for work on a railroad that "the amount of work performed under this contract shall be determined by the measurements and calculations of the engineer in charge," amounts to nothing more than a provision for a means of determining the amount of the work, and either fraud or mistake of the engineer is ground for relief on the part of the contractor. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

See *Insane Persons*; *Sunday*, 2.

CONVERSION.

1. **WILLS—Equitable Conversion.**—If a testator devises land to his wife for life, in trust for their children, and directs the executor, after her death, to sell the property and divide the proceeds among the children, the effect of this direction is to convert the land into personalty. (Cal.) *Bank of Ukiah v. Rice*, 118.

2. **WILLS—Election to Take Land Instead of Its Proceeds.**—Where a testator directs land to be sold and the proceeds distributed among designated beneficiaries, they may elect, before the sale is made, to take the land instead of its proceeds. The estate is thereby reconverted into realty, and their relation to it is the same as if it had been directly devised to them. But until they make the election for a reconversion, and manifest the same to the executor, they are not entitled to the possession of the land, or to exercise any dominion over it. (Cal.) *Bank of Ukiah v. Rice*, 118.

3. **WILLS—Insufficient Election to Take Land Instead of Its Proceeds.**—Where a testator devises land to his wife for life, in

trust for their children, and directs the executor, after her death, to sell the property and divide the proceeds among the children, and one of the children gives a mortgage on his undivided interest, which is followed by the execution of a sheriff's deed under a judgment of foreclosure, such election to take the land instead of its proceeds, on his part only, is insufficient to work a reconversion of the property into realty; so, too, is the bringing of an action for partition by the purchaser under the mortgage, when it is not alleged that the beneficiaries have made an election, and some of them are minors. (Cal.) *Bank of Ukiah v. Rice*, 118.

See *Trover*.

CONVEYANCES.

See *Deeds*.

COPYRIGHT.

See *Monopolies*.

CORPORATIONS.

Execution of Instruments.

1. **CORPORATIONS—Conveyances by Presumption from Affixing Seal.**—If a corporate seal is affixed to an instrument, and the signatures of the proper corporate officers are proven, it must be presumed that such officers had the authority which they exercised. The seal itself is *prima facie* evidence that it was affixed by proper authority. (Ala.) *Graham v. Partee*, 32.

2. **CORPORATIONS—Instrument Sealed but not Signed—Evidence.**—If the corporate seal is affixed to a corporate instrument, such seal is *prima facie* evidence that it was thus affixed by proper authority, and the instrument duly executed, and it is then admissible in evidence, although the corporate name is not signed thereto. (Ala.) *Graham v. Partee*, 32.

Transfer and Purchase of Stock.

See *Gifts*, 2, 3.

3. **CORPORATIONS—Contract for Sale of Stock.**—If a corporation contracts to sell stock and agrees that at a certain time thereafter the purchaser shall be entitled to return the stock upon the happening of a designated event, the corporation cannot claim that the sale was valid, and the contract to repurchase void, without rescinding the sale, returning the purchase money, and placing the purchaser in *statu quo*. (Mont.) *Porter v. Plymouth Gold Min. Co.*, 569.

4. **CORPORATIONS—Right to Purchase Their Own Stock.**—A private corporation may purchase its own stock if the transaction is fair and in good faith, free from actual or constructive fraud, provided the corporation is not insolvent, or in process of dissolution, and that the rights of its creditors are in no way affected by the purchase. (Mont.) *Porter v. Plymouth Gold Min. Co.*, 569.

5. **CORPORATIONS—Right to Purchase Stock—Decrease of Stock.**—The mere repurchase of its capital stock by a private corporation does not tend to decrease its capital stock, unless the directors absolutely merge or extinguish such stock after its repurchase. (Mont.) *Porter v. Plymouth Gold Min. Co.*, 569.

6. **CORPORATIONS—Contract for Repurchase of Stock—Withdrawal of Subscription.**—A contract by which a private corporation agrees to sell stock and to repurchase upon the happening of a certain event, is not ultra vires or void, as a secret contract between the corporation and a subscriber, by which such subscriber is at liberty to withdraw his subscription, but is valid and enforceable. (Mont.) Porter v. Plymouth Gold Min. Co., 569.

7. **CORPORATIONS—Purchase of Stock.**—A purchaser of the stock of a private corporation under a contract entitling him to convey to the corporation upon the happening of a certain event, and to receive the price paid, cannot compel the corporation to repurchase the stock, without a redelivery of it to the corporation. (Mont.) Porter v. Plymouth Gold Min. Co., 569.

8. **CORPORATIONS—Option to Repurchase Stock.**—If an option to repurchase corporate stock is to be exercised "at the expiration of six months from date," the seller is not bound to repurchase until the expiration of the six months, and an offer to redeliver the stock before that time is premature, and ineffective. (Mont.) Porter v. Plymouth Gold Min. Co., 569.

9. **CORPORATIONS—Repurchase of Stock.**—The fact that the buyer of corporate stock is "ready and willing" to return it in accordance with a contract for its repurchase, does not constitute an offer to return such stock. (Mont.) Porter v. Plymouth Gold Min. Co., 569.

See Taxation, 3, 4.

COTENANCY.

See Partition; Tenancy in Common.

COUNTIES.

THE STATUTE OF LIMITATIONS Runs Against a County to recover public money wrongfully collected and withheld by one of its fiducial agents, who is an ex-county officer. (Idaho.) Bannock County v. Bell, 140.

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statutes of limitation, whether run against, 154-156.

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COURTS.

JUDICIAL UTTERANCES, Restriction upon Effect of.—In applying cases which have been decided, what may have been said in the opinion should be confined to, and limited by, the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. (N. Y.) Crane v. Bennett, 722.

CREDITOR'S BILL.

See Fraudulent Conveyance.

CRIMINAL LAW.

Insanity.

1. **INSANITY AS DEFENSE.**—Instructions stating that lunatics and insane persons are incapable of committing crimes, and that if the defendant was an insane person he should be acquitted, are erroneous if not qualified by adding a definition of the term "insanity," because some forms of insanity are no defense to crime. (Mont.) State v. Keerl, 579.

2. **INSANITY as Defense to Crime** is a question of fact for the jury to determine under proper instructions. (Mont.) State v. Keerl, 579.

3. **INSANITY as Defense to Crime.**—An insane person in criminal law, incapable of committing a crime, is one who is so mentally unsound as to be unable to form a criminal intent to commit the particular crime charged. (Mont.) State v. Keerl, 579.

4. **CRIMINAL LAW—Insanity as Defense.**—The Burden of Proving insanity as a defense to crime is upon the defendant, who must establish it by a preponderance of the evidence. (Wash.) State v. Clark, 1006.

5. **CRIMINAL LAW—Insanity as Defense—Instructions.**—If insanity is set up as a defense to murder, it is not error to instruct the jury to convict if satisfied beyond a reasonable doubt that the accused committed the crime as charged, if other instructions fully and fairly inform the jury upon the defense of insanity. (Wash.) State v. Clark, 1006.

6. **CRIMINAL LAW—Incest—Insanity as Defense—Guardianship of Wife—Evidence.**—If a husband charged with incest sets up insanity as a defense, the record of the adjudication of his insanity and of the appointment of his wife as his guardian is not admissible in evidence to show that she who instituted the prosecution for incest was in duty bound to look after his defense. Her attitude in the matter can be better shown by other evidence. (Wash.) State v. Glindemann, 1001.

7. **MURDER—Insane Delusions.**—Instructions that insane delusions, to excuse murder, must be such that if things were as the person possessed of such delusions imagined them to be they would justify the act springing from such delusions, and that one suffering from a partial delusion was in the same situation as to responsibility as if the facts with respect to which the delusion existed were real, are radically wrong, and fatally erroneous. (Mont.) State v. Keerl, 579.

8. **CRIMINAL LAW—Insanity as Defense.**—If a person is charged with the commission of a crime, and if at the time of its commission, by reason of disease affecting his mind, his mental faculties were so impaired or perverted, as that he was unable to distinguish between right and wrong as to the particular act with which he is charged, or if he was able to recognize that it was wrong, and yet was impelled by some impulse, originating in disease, to the commission of the act, and was unable by reason of the diseased condition of his mind, enfeebling his will, or otherwise, to refrain from its commission, he is not guilty by reason of his insanity. (Mont.) State v. Keerl, 579.

Evidence of Flight.

9. **EVIDENCE OF GUILT.**—Flight is not Presumptive Evidence, but is only a circumstance to be considered in connection with the

other evidence in arriving at the guilt or innocence of the accused. (Iowa.) State v. Poe, 307.

Possession of Stolen Goods.

10. **CRIMINAL LAW—Possession of Recently Stolen Goods—Explanation.**—If the attendant circumstances are such as to satisfy the jury of the falsity of the explanation of the possession of recently stolen goods, and of the guilt of the possessor, his conviction is justified. (Iowa.) State v. Raphael, 334.

11. **CRIMINAL LAW—Possession of Recently Stolen Goods.—Burden of Proof** is on one in possession of recently stolen goods, to satisfactorily explain his possession. (Iowa.) State v. Raphael, 334.

12. **STOLEN PROPERTY—Recent Possession of—Presumption of Guilt.**—To raise a presumption of guilt from the possession of recently stolen property it is necessary that it be found in the exclusive possession of the prisoner. He can only be required to account for the possession of things which he actually and knowingly possessed. (Mo.) State v. Drew, 474.

13. **STOLEN PROPERTY—Recent Possession of—Presumption of Guilt.**—The finding of recently stolen articles on the premises of a man of a family, without showing his actual, conscious possession thereof, discloses only a prima facie constructive possession, and is not such a possession as will justify a presumption of guilt by reason thereof. (Mo.) State v. Drew, 474.

14. **STOLEN PROPERTY as Evidence of Crime.**—If in a prosecution for larceny there is no evidence of a conspiracy between the accused and another to commit the crime, articles taken from such other's house under a search-warrant are not admissible in evidence. (Mo.) State v. Drew, 474.

Dying Declarations.

15. **EVIDENCE—Dying Declarations.**—What weight should be given to dying declarations is for the determination of the jury alone. (Ala.) Sims v. State, 17.

16. **HOMICIDE—Evidence of Dying Declarations.**—Oral evidence may be received of dying declarations made by the deceased and reduced to writing, but not signed by him. (Ala.) Sims v. State, 17.

17. **EVIDENCE—Dying Declarations.**—To render dying declarations admissible, it is only necessary that they be made after the infliction of a mortal wound, and after hope of recovery was abandoned by the declarant, and after he realized his impending death. (Ala.) Sims v. State, 17.

18. **EVIDENCE.—Dying Declarations of a deceased made and written** when he has not lost all hope of recovery, but reaffirmed by him as true and correct, after he realized his impending death, and while he was in full possession of his mental faculties, are admissible in evidence, although not read over to the declarant at the time he reaffirmed their correctness. (Ala.) Sims v. State, 17.

Jury.

See Jury.

19. **JURY—Separation in Criminal Trial.**—If, after the final submission of a criminal case, the officer in charge of the jurors separates them into three groups, and puts them in three different rooms on

three different floors of a hotel, for eight or nine hours, the defendant is entitled, without an affirmative showing of prejudice, to a new trial. (Cal.) *People v. Adams*, 92.

20. **CRIMINAL TRIAL**—Province of Judge and Jury.—The responsibility of determining whether or not the defendant in a criminal case should be found guilty rests entirely upon the jury, and the judge should be careful in his instructions not to use language which might naturally be understood by the jury as intimating his opinion that the defendant is guilty, or as an argument against him. (Cal.) *People v. Adams*, 92.

Instructions.

21. **MURDER**.—Instructions in a murder case, that certain evidence is corroborative of other evidence, is a comment on the weight of the evidence, and therefore reversible error. (Mont.) *State v. Keerl*, 579.

22. **TRIAL**.—Instructions assuming that an accused has made certain statements adverse to his interest are erroneous and should be limited to the statements proved on the trial. (Mo.) *State v. Drew*, 474.

Sentence.

23. **CRIMINAL LAW**—Inadequate Sentence—Habeas Corpus.—A judgment of imprisonment for a term less than that prescribed by statute for the offense committed is not void, and the prisoner will not be discharged on habeas corpus. (Cal.) *In re Reed*, 133.

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Criminal Law. See Arson; Burglary; Larceny; Possession of Stolen Property.

CROPS.

See Damages, 3.

CURATIVE STATUTE.

See Executions, 2.

DAMAGES.

1. **DAMAGES**—Mental Suffering.—In an Action Sounding in Tort the rule allowing recovery for mental suffering is much more liberal than in actions on contract. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

2. **DAMAGES**, Consequential in Actions of Tort.—One who commits a trespass or other wrongful act is liable for all the direct injuries resulting from such act, although such injury could not have been contemplated as a probable result of the act done. Hence, in this class of actions, recovery may be had for mental suffering. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

3. **DAMAGES**—Measure of for Destruction of Crops.—The measure of damages for injury to or the destruction of growing crops is their value in the condition they were in at the time of injury or destruction, and not the market value at the time of their maturity or during the market season. (Utah.) *Lester v. Highland Boy Gold Min. Co.*, 988.

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4. **DAMAGES, UNLIQUIDATED—Interest.**—In tort for unliquidated damages interest on the damages recovered from the time of the commencement of the action to the time of verdict, cannot be assessed. (Utah.) *Lester v. Highland Boy Gold Min. Co.*, 988.

5. **DAMAGES FOR PERSONAL INJURY—When not Excessive.** A verdict of seven thousand seven hundred and fifty dollars for injuries received by a boy of fourteen years requiring the amputation of his right leg below the knee is not excessive. (Minn.) *Perry v. Tozer*, 416.

6. **EVIDENCE.**—In an Action for Personal Injuries the evidence of experts as to future consequences which are expected to follow the injury are competent, but to authorize such evidence the apprehended consequences must be such as in the ordinary course of nature are reasonably certain to occur. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating damages, and may not be proved. (N. Y.) *Briggs v. New York Cent. etc. R. R. Co.*, 718.

7. **EVIDENCE.**—A Medical Expert Should not be Permitted in an action for personal injuries to state numerous things which might result as consequences of the injury, as that it might affect the bladder or kidneys or other organs of the body and in the end become permanent. (N. Y.) *Briggs v. New York Cent. etc. R. R. Co.*, 718.

See Banks and Banking, 3-5; Death; Telegraphs and Telephones.

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DANGEROUS PREMISES.

See Negligence, 10-12.

DEATH.

1. RAILROADS—Negligence Causing Death—Measure of Damages.—An instruction that the measure of damages against a railroad for negligently causing the death of its employé is all of the wages that he would probably have earned during the period of his life expectancy, is objectionable as authorizing too great a recovery, but is not ground for reversal when the jury does not return an excessive verdict. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

2. ACTIONS—Unnecessary Parties—Construction of Statute.—If a statute creates a liability against a railroad company for damages due to any of its employés arising out of the negligence of its agents, and declares that the amount recovered shall inure to the exclusive benefit of the widow and children of the deceased employé, and if he is not a resident of the state, that suit may be maintained by the widow, such statute makes the widow the trustee of an express trust, and suit may be maintained by her alone for the benefit of herself and her children, the joining of such children as parties plaintiff, though unnecessary, is not a fatal defect to the maintenance of the action. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

DEEDS.

1. DEED FOR SECURITY—Liability not Limited by Consideration Recited.—The security of a deed, in form absolute, given to indemnify sureties, is not limited to the nominal money consideration recited, but extends to the full amount for which the sureties ultimately prove liable. (Neb.) *County of Harlan v. Whitney*, 610.

2. DEEDS—Cancellation—Agreement for Support.—If a grantor conveys land and the consideration is an agreement by the grantee to support, maintain, and care for the grantor during the remainder of his or her natural life, and the grantee refuses or neglects to comply with the contract, the grantor may, in equity, have a decree rescinding the contract and deed and reinvesting him with the title to the land, on the ground that the contract was fraudulent in its inception. (Ill.) *Stebbins v. Petty*, 243.

3. DEEDS—Agreement for Support—Cancellation as Against Grantee's Heirs.—If a grantee performs her agreement to support a grantor during his lifetime, given as a consideration for his deed, the failure of the minor heirs of such grantee to perform the agreement after her death is not ground for cancellation of the deed, unless there is an unsatisfied judgment in some prior proceeding requiring such heirs to perform the grantee's agreement. (Ill.) *Stebbins v. Petty*, 243.

4. DEEDS FOR SUPPORT—Reservation of Lien—Foreclosure.—If a deed executed in consideration of the grantee's agreement to support the grantor during his lifetime reserves a lien on the land to secure performance of the agreement, the grantor may foreclose such lien against the grantee's heirs who fail to perform such agreement. (Ill.) *Stebbins v. Petty*, 243.

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DYING DECLARATIONS.

See Criminal Law, 15-18.

EASEMENTS.

1. **EASEMENT—Ways Created by Deed—Enforcement.**—A reservation in a deed of a specific part of granted premises to be used as a driveway in common by the grantees, and adjoining owners of land, creates an easement in the property granted appurtenant to the adjoining land of the grantor, and binding on that conveyed to the grantee, which passes with the land to all subsequent grantees, and which may be protected or enforced at law or in equity. (Ohio St.) *Gibbons v. Ebding*, 900.

2. **EASEMENTS—Ways—Right to Close with Gates or Bars.**—If a right of way is created by reservation in a deed, the grantee acquires the property subject only to such right and may use the land for all purposes not inconsistent with it, and in the absence of anything in the deed or in the circumstances under which the way was acquired or used, showing that it was to be open, the grantee may put gates or bars across it, unless they would unreasonably interfere with its use. (Ohio St.) *Gibbons v. Ebding*, 900.

See Municipal Corporations, 5-9.

EJECTMENT.

EJECTMENT—Title Sufficient to Maintain.—A purchaser at foreclosure sale of property conveyed by a first and second mortgage shows title sufficient to maintain ejectment against the mortgagor, by introducing and proving a deed of the premises from the second mortgagee to him as purchaser at foreclosure sale. (Ala.) *Graham v. Partee*, 32.

ELECTRICITY.

ELECTRIC RAILROADS—Negligence—Injury to Stock.—A railroad company operating its road by electricity and knowingly running its trains under conditions rendering it impracticable for those in charge to prevent injuring stock straying upon its tracks, is accountable for the loss when injury occurs. (Ala.) *Anniston Electrical etc. Co. v. Hewitt*, 42.

ELEVATED RAILWAY.

See *Municipal Corporations*, 7-9.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Public Use.**—Constitutional provisions that private property shall not be taken for public use without compensation, mean that private property cannot be taken for strictly a private use. (Utah.) *Nash v. Clark*, 953.

2. **EMINENT DOMAIN—Public Use.**—Property is taken for a public use, when the taking is for a use that will promote the public interests and will tend to develop the natural resources of the state. (Utah.) *Nash v. Clark*, 953.

3. **EMINENT DOMAIN—Public Use—Irrigation.**—The owner of an arid farm may, under the exercise of the right of eminent domain, condemn a right of way through the ditch of another, for the purpose of carrying water to his land for irrigation purposes. Such taking is for a public use. (Utah.) *Nash v. Clark*, 953.

4. **EMINENT DOMAIN—Public Use.**—Irrigation of lands is for a public purpose, and water thus used is put to a public use. (Utah.) *Nash v. Clark*, 953.

EMPLOYER'S LIABILITY.

See *Master and Servant*.

EQUITY.

EQUITY.—Jurisdiction in Equity Depends not so much on the want of a common-law remedy as upon its inadequacy, and its exercise often rests in the discretion of the court; in other words, the court may take upon itself to say whether the common-law remedy is, under all the circumstances and in view of the conduct of the parties, sufficient for the purpose of complete justice. (Pa. St.) *Blair v. Supreme Council American Legion of Honor*, 934.

ESTATES OF DECEDENTS.

See *Executors and Administrators*.

EVIDENCE.*Miscellaneous.*

1. **EVIDENCE.**—X-Ray Pictures are Admissible in evidence, in an action for personal injuries, to show the condition of the interior tissues of the injured member. (Neb.) *Geneva v. Burnett*, 628.

2. **EVIDENCE of Absent Witness.**—The testimony of a witness given at a preliminary examination, with opportunity for cross-examination, is not admissible upon the subsequent trial merely upon proof of the absence of the witness from the state. To make such testimony admissible it must be shown that the witness is either a nonresident or permanently absent from the state, or that he is absent such a length of time as to make his return contingent and uncertain. (Ala.) *Sims v. State*, 17.

3. **EVIDENCE—Witnesses—Failure to Deny Statement.**—The fact that a witness did not deny a statement made in her presence at a former trial and attributed to her is incompetent as tending to establish the falsity of her testimony in denying such statement given at a subsequent trial. (N. H.) *Horan v. Byrnes*, 670.

Letters.

4. **EVIDENCE.**—A Letter from the chief engineer of the defendant to plaintiff, a contractor, proposing a compromise to his claim for extra work is admissible in evidence as an admission, to the extent that it states certain facts are shown by a remeasurement of the work. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

5. **EVIDENCE.**—If Parts of Letters are introduced in evidence by plaintiff, defendant is entitled to have the whole of the letters read in evidence. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

Res Gestae.

6. **EVIDENCE—Res Gestae.**—Declarations or statements made by a person immediately after the injury is inflicted upon him, as an intimately connected and natural result or detail thereof, in the presence of all the physical facts of the accident, are admissible as part of the res gestae. (N. H.) *Murray v. Boston etc. R. R.*, 660.

7. **EVIDENCE—Res Gestae.**—Declarations by an injured person as to the cause of the accident, made immediately thereafter, cannot be excluded as part of the res gestae on the ground that they are in the form of a narrative, and made in answer to a question. (N. H.) *Murray v. Boston etc. R. R.*, 660.

Parol to Vary Writing:

See Mortgages, 2.

8. **EVIDENCE.**—Receipts in Full are not conclusive that nothing more is due, but may be shown to be erroneous. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

9. **CONTRACTS—Variance by Subsequent Parol Agreement.**—Though a written contract stipulates that "no compensation for extra work, and no compensation for any work other than the compensation herein stipulated shall be paid unless ordered or agreed to in writing," yet a recovery may be had for extra work done under a subsequent parol agreement to pay an agreed price therefor. (Ky.) *Illinois Cent. R. R. Co. v. Manion*, 345.

10. **CONTRACTS—Variance by Parol.**—Though parties to a contract stipulate that it is not to be varied except by an agreement in

writing, they may, by a subsequent agreement, not in writing, modify it by mutual consent, and the parol contract will be enforced, unless forbidden by the statute of frauds. (Ky.) Illinois Cent. R. R. Co. v. Manion, 345.

See Criminal Law; Homicide, 6, 7; Damages, 6, 7; Homicide, 7.

EXECUTIONS.

Curing and Amending.

1. **EXECUTIONS, VOIDABLE—Amendment of.**—Under a statute providing among other things that a writ of execution must be issued in the name of the state, sealed with the seal of the court, and subscribed by the clerk thereof, the failure of the latter to affix the seal of the court is a mere clerical error, which renders the execution voidable only and leaves it subject to amendment. (Mont.) Kipp v. Burton, 544.

2. **EXECUTIONS, VOIDABLE—Curative Statute.**—A sale made under an execution defective and voidable by reason of its failure to contain the seal of the court, made prior to the enactment of a statute providing that all judicial sales of real property previously made on proceedings to satisfy valid judgments, shall be sufficient to sustain a sheriff's deed based on such sale, is validated by such statute, without amendment of such execution by the court. (Mont.) Kipp v. Burton, 544.

Sales—Reversal of Judgment.

See Appeal and Error, 11-14; Attachment, 3.

3. **EXECUTION SALE—Setting Aside After Reversal of Judgment.**—A rule to set aside a sheriff's sale taken after the payment of the purchase money, the delivery and recording of the deed, and the obtaining of possession by the purchaser, is too late; and it does not affect the question that the plaintiff in the execution is the purchaser, and the judgment has been reversed. (Pa. St.) Lengert v. Chaninell, 931.

4. **EXECUTION SALE—Reversal of Judgment—Restitution.**—An execution creditor who purchases at the sale is within the protection of a statute providing that where land has been sold under a writ issued upon a judgment afterward reversed, the land shall not be restored, but there shall be restitution only of the money or price for which the property was sold. (Pa. St.) Lengert v. Chaninell, 931.

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EXECUTORS AND ADMINISTRATORS.

Probate Proceedings.

1. **PROBATE COURTS—Jurisdiction.**—The probate court in adjusting the accounts of executors, administrators, and guardians, has equitable jurisdiction and may adopt equitable forms of procedure. (Ill.) *Heppe v. Szczepanski*, 221.

2. **PROBATE COURTS—Jurisdiction at Subsequent Term.**—A probate court has jurisdiction, at a subsequent term, to set aside an order discharging an executor and approving his report reciting the release of the widow's award, if such release was obtained by fraud, accident, or mistake. (Ill.) *Heppe v. Szczepanski*, 221.

3. **PROBATE COURTS—Validity of Order Made at Subsequent Term.**—A probate court order made at a subsequent term setting aside an order discharging an executor and releasing a widow's award, is void as to minor heirs in reviving the claim of the widow and directing the sale of the minor's interests in land, if the only showing of notice to the minors necessary to jurisdiction over them is a recital in such order that they appeared by guardian ad litem, whose appointment is not shown by the record. (Ill.) *Heppe v. Szczepanski*, 221.

Sales of Property.

4. **JUDICIAL SALES—Heirs as Parties.**—If a petition is filed by an administrator or executor for the sale of land to pay debts, minor heirs must be made parties, and must be served with summons. (Ill.) *Heppe v. Szczepanski*, 221.

5. **JUDICIAL SALES—Service of Summons on Heirs in a proceeding by an executor to sell real estate to pay debts by leaving a copy for them with the widow, their mother, and informing her of its contents is void when she is the real, though not the nominal, petitioner, and is acting adversely to the interests of such heirs.** (Ill.) *Heppe v. Szczepanski*, 221.

6. **JUDICIAL SALES—Service of Summons on Heirs.**—If a bill is filed against minor heirs to subject their land to sale, the service of summons on them by leaving a copy thereof with the complainant, and informing him of its contents, will confer no jurisdiction on the court, as to the person of such minors, and the decree of sale rendered on such service is void as to them. (Ill.) *Heppe v. Szczepanski*, 221.

7. ADMINISTRATOR'S SALE—Laches.—The Right to Question the validity of a sale of a decedent's property, on the ground that the administrator purchased thereat, may be barred by laches. (Neb.) *Shelby v. Creighton*, 630.

8. WHERE AN ADMINISTRATOR PURCHASES PART OF HIS DECEDENT'S PROPERTY, a final order approving his accounts and discharging him is conclusive on all parties of every matter involved, including the validity of the sale. (Neb.) *Shelby v. Creighton*, 630.

FELLOW-SERVANTS.

See Master and Servant, 20-25.

FIXTURES.

FIXTURES—Mortgage Lien.—If machinery is purchased and placed for use in a permanent building under a contract that it shall remain the property of the seller, or, after such machinery is placed in the building, a chattel mortgage is given by the purchaser to the seller on such machinery, a prior real estate mortgage on the building given by such purchaser is not a prior lien on such machinery so as to estop the chattel mortgagee from foreclosing his mortgage. (Idaho.) *Anderson v. Creamery etc. Co.*, 188.

FLIGHT OF ACCUSED.

See Criminal Law, 9.

FOREIGN CORPORATIONS.

See Taxation, 3, 4.

FOREIGN JUDGMENTS.

See Judgments, 6-8.

FORGERY.

FORGERY—Negotiable Instruments.—If a bank by mistake informs a person that it holds a deposit of money to his credit, and the addressee requests a draft for the amount, and upon receiving such draft indorses it, receiving the money, his indorsement does not constitute forgery. (Utah.) *Heavey v. Commercial Nat. Bank*, 966.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS.—A Sale of Wild Grass growing upon the vendor's land is within the statute of frauds, and a written contract cannot be dispensed with. (Minn.) *Kirkeby v. Erickson*, 411.

2. DEEDS, Parol Surrender of a Right to Redeem from a Deed Absolute on Its Face.—When a deed absolute on its face is given with a parol agreement that it is given and received as security for a debt, the grantor may, by parol agreement, surrender his right of redemption, and vest complete title in the grantee. (Iowa.) *Baxter v. Pritchard*, 282.

3. HOMESTEAD—Oral Transfer in Consideration of Support.—An oral agreement between a son and his parents that he shall, in consideration of carrying on their business and providing for their support,

become vested, upon their death, with the title to the family homestead, contravenes the statute of frauds and the statute of wills; but, if fairly made and substantially performed by the son, equity may grant him relief in case the parents repudiate the agreement. (Neb.) *Teske v. Dittberner*, 614.

FRAUDULENT CONVEYANCE.

FRAUDULENT CONVEYANCE—Bill to Set Aside Before Judgment.—A creditor who attaches real estate as the property of his debtor, after an alleged fraudulent conveyance thereof, cannot, before reducing his claim to judgment, maintain a creditor's bill to set aside the conveyance. (Cal.) *Aigeltinger v. Einstein*, 131.

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See Confusion of Goods, 3.

GIFTS.

1. **GIFT**—The Acceptance of a Gift may be Presumed. (Pa. St.) *Sparks v. Hurley*, 926.

2. **GIFT of Stock by Transfer on Books**—A Husband may make a gift of stock to his wife by a transfer of an account from his name to hers, upon the books, although she does not know of it at the time and does not then accept it. (Pa. St.) *Sparks v. Hurley*, 926.

3. **GIFTS**—Evidence that the Owner of Corporate Stock Delivered the Certificate Thereof to another person, accompanied with words declaring the donor's intention to make a gift to such person, and that the stock was accepted and subsequently held by such donee, warrants a finding that the gift was absolute. (N. H.) *Bond v. Bean*, 686.

4. **GIFTS**—Evidence of Intention.—The fact that a certificate of corporate stock is not indorsed and assigned by the donor to the donee does not render the gift of it incomplete, but is evidence bearing upon the intention with which the donor made the gift, to be considered by the jury with the other evidence. (N. H.) *Bond v. Bean*, 686.

5. **GIFT OF MONEYS on Deposit in Bank**—If the holder of a bank-book delivers it to another with an order directing that the amount due be paid to the latter, who afterward retains the possession of such book, this constitutes a gift of such amount. (N. Y.) *Matter of Barefield*, 814.

GUARANTY.

1. **GUARANTY** is a Promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself, in the first instance, liable to such payment or performance. (N. C.) *Cowan v. Roberts*, 845.

2. **GUARANTY OF PAYMENT**—Guaranty for Collection.—A guaranty of payment is an absolute promise to pay a debt at maturity if not paid by the principal debtor, while a guaranty for collection is only a promise to pay the debt upon condition that the guarantee diligently prosecutes the principal debtor for the recovery of the debt without success. (N. C.) *Cowan v. Roberts*, 845.

3. **GUARANTY—Absolute.**—The words "I do hereby guarantee any debts" is an absolute, direct, and unconditional promise to answer for the default of the principal debtor. (N. C.) *Cowan v. Roberts*, 845.

4. **GUARANTY—Consideration.**—The promise of the guarantee to furnish goods to the principal is sufficient consideration to support the contract of guaranty. (N. C.) *Cowan v. Roberts*, 845.

5. **GUARANTY—Absolute—Notice of Acceptance.**—If an undertaking is to guarantee any contract which may be made the obligation is not collateral and contingent, but absolute and unconditional, and no notice of acceptance is necessary. (N. C.) *Cowan v. Roberts*, 845.

6. **GUARANTY.**—Notice of Acceptance is not required when there is a direct promise of guaranty. (N. C.) *Cowan v. Roberts*, 845.

7. **GUARANTY—Fraud of Principal.**—If a principal debtor agrees to secure a second guarantor before delivery of the contract of guaranty, without the knowledge of the guarantee, but fails to do so, the guarantor is still bound by his contract. (N. C.) *Cowan v. Roberts*, 845.

8. **GUARANTY—Negligence of Guarantor.**—Failure by the guarantor, for a long period, to notify the guarantee that the condition of the delivery of the contract of guaranty has not been complied with, during which time further credit has been extended, estops the guarantor from taking advantage of the breach of such condition. (N. C.) *Cowan v. Roberts*, 845.

9. **GUARANTY.**—Burden of, Showing Lack of Diligence by the guarantee in prosecuting the principal debtor so as to release the guarantor, is upon the latter. (N. C.) *Cowan v. Roberts*, 845.

GUARDIAN.

See Infants.

HABEAS CORPUS.

See Criminal Law, 23.

HIGHWAYS.

1. **HIGHWAY—Rights in, Acquired by Public.**—By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, which incidents do not embrace the subterranean waters of the road. (Cal.) *Wright v. Austin*, 97.

2. **HIGHWAY—Percolating Water, Injunction Against Using.**—The public authorities may be enjoined, at the suit of the owner of the fee, from taking the subterranean waters from a highway to sprinkle it. (Cal.) *Wright v. Austin*, 97.

3. **NEGLIGENCE—Proximate Cause.**—If a hole in a highway gives a bicycle rider thereon an impetus which carries him over an unrailed and dangerous embankment to his injury, the hole, and not the embankment, cannot, as matter of law, be regarded as the cause of the injury. (N. H.) *Hendry v. North Hampton*, 681.

4. **MUNICIPAL CORPORATIONS—Defective Highway.**—If a town allows an embankment along a highway therein to remain in an unrailed and dangerous condition, it is liable to a bicycle rider

who, without fault on his part, is injured thereby. (N. H.) Hendry v. North Hampton, 681.

5. HIGHWAYS—Defects in.—A bicycle rider injured by reason of a defect in a highway, consisting of an unrailed and dangerous embankment, rendering it unsuitable for ordinary travel, is entitled to recover for an injury received thereby. (N. H.) Hendry v. North Hampton, 681.

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HOLIDAYS.

LEGAL HOLIDAYS.—Ministerial Acts by public officers may properly be performed on legal holidays, in the absence of express statutory prohibition, and statutes prohibiting judicial acts on such days do not apply to such as are merely ministerial. (Idaho.) *Havens v. Stiles*, 195.

See Sunday.

HOMESTEADS.

In General.

1. **HOMESTEADS—Estate in Land.**—A homestead is an estate in land, and not merely an exemption; and when the interest of the homesteader does not exceed in value the statutory limit, the homestead estate comprises his entire title, leaving no interest to which liens can attach or which he can convey separately. (Ill.) *Roberson v. Tippie*, 217.

2. **HOMESTEADS—Basis of Estate.**—A homestead estate is based upon the title of the homesteader, and can have no separate existence independent of the title which constitutes one of its essential elements and from which it is inseparable. (Ill.) *Roberson v. Tippie*, 217.

3. **HOMESTEADS—Descent of.**—Upon the death of the homesteader, the homestead estate by operation of law devolves upon the surviving husband or wife for life and upon their child or children during the minority of the youngest, and the heirs at law take a reversionary interest only, expectant upon the termination of the estate for life or for years created by the statute. (Ill.) *Roberson v. Tippie*, 217.

Sales and Leases.

See Frauds, Statute of, 3.

4. **HOMESTEADS—Conveyance of—Husband and Wife.**—The statutory provision declaring that no conveyance of the homestead shall be valid unless in writing, subscribed by the homesteader and his wife applies to deeds made by a husband to his wife, and therefore a conveyance of a homestead, not exceeding the statutory value, by a husband to his wife, she not joining therein, is absolutely void and passes no title. (Ill.) *Roberson v. Tippie*, 217.

5. HOMESTEADS—Conveyance of—Husband and Wife.—The amount paid by a wife as a consideration for the conveyance of a homestead to her by her husband, in which she does not join, as required by statute, is not a lien, in law or equity upon the land attempted to be conveyed. (Ill.) *Roberson v. Tippie*, 217.

6. HOMESTEADS—Lease of—Consent of Wife.—A husband, without consent of his wife, may lease the homestead lands for purposes not interfering with the use of the property as a homestead; but he cannot do so when the lease interferes with such use. (Ala.) *Millikin v. Carmichael*, 29.

7. HOMESTEADS—Lease of—Consent of Wife.—A husband alone, and without the consent of his wife, may lease the premises constituting their homestead for the turpentine privileges thereon, with right of ingress and egress for the purposes of the lease. (Ala.) *Millikin v. Carmichael*, 29.

HOMICIDE.

Degrees of Murder.

1. CRIMINAL LAW—Instructions Defining Degrees of Murder.—On a prosecution for murder, it is not error to repeat instructions defining murder in the first and second degrees, on the ground that they tend to intensify the crime as murder, when the only purpose or effect of such instructions is to more fully point out the distinction between the two different degrees of murder. (Wash.) *State v. Clark*, 1006.

2. CRIMINAL LAW—Murder—Sufficiency of Evidence.—A conviction of murder in the first degree must stand, when the circumstances show that there can be no possible doubt that the defendant did the killing through jealousy, although no one saw it done, and when there is no evidence of his insanity, set up as a defense, except his own statement that he did not know what he was doing at the time, and the statement of witnesses that he "looked wild" and "acted nutty." (Wash.) *State v. Clark*, 1006.

Indictment and Information.

3. MURDER.—Information for murder need not expressly allege an intent to kill. (Mont.) *State v. Keerl*, 579.

4. MURDER.—Information for murder must directly allege that death resulted from the mortal wound or wounds inflicted by the defendant. (Mont.) *State v. Keerl*, 579.

5. MURDER.—Information for murder which is defective in insufficiently alleging the cause of death is not cured by a concluding allegation that "so the said defendant did kill and murder the said deceased." (Mont.) *State v. Keerl*, 579.

Evidence.

6. HOMICIDE—Evidence that Deceased Carried Weapon.—On a murder trial, it is not competent to prove by a witness other than the accused that the deceased was in the habit of carrying a pistol, unless such fact is traced to the knowledge of the accused. (Ala.) *Sims v. State*, 17.

7. HOMICIDE—Expert Evidence as to Character of Wound.—A physician who attended the deceased after he had received the wound which caused his death, is competent to state his opinion as to whether or not the wound was fatal. (Ala.) *Sims v. State*, 17.

HUSBAND AND WIFE.*Wife's Separate Property.*

1. HUSBAND AND WIFE—Wife's Separate Property.—If a married woman living with her husband, takes a half interest in a contract to work a mine on shares, hires a man to do half the work, and pays him out of her share of the clean-up, while she personally supervises the work, the net profits of her mining enterprise are her separate property, under a statute exempting property acquired by a married woman "by her own labor," from the debts or contract liabilities of her husband. (Wash.) *Elliott v. Hawley*, 1016.

2. HUSBAND AND WIFE—Wife's Separate Property—Partnership Property.—If money acquired by a married woman in one state as a member of a partnership, there becomes her separate property, and is brought into another state and deposited as the funds of such partnership, her share thereof remains her separate property, and real estate there purchased by her and paid for by a check of such partnership, in a sum less than her share of such deposit, is not subject to her husband's separate debt. (Wash.) *Elliott v. Hawley*, 1016.

3. HUSBAND AND WIFE—Wife's Separate Property.—Restrictions Against Partnerships formed by husband and wife are intended only to protect the wife against her husband's separate debts, and not to deprive her of her separate property. (Wash.) *Elliott v. Hawley*, 1016.

4. HUSBAND AND WIFE—Wife's Separate Property—Commingle of Funds.—If the amount of money invested by husband and wife in a joint enterprise is definite as to the amount advanced by each, and yields a definite income or increase, there is no such commingling of their separate property, as to cause it to lose its identity. (Wash.) *Elliott v. Hawley*, 1016.

Wife's Power of Sale.

5. MARRIED WOMEN—Power of Sale of Land—Execution of, Without Joinder of Husband.—If a testator, by his will, devises all his property to his wife, "during her lifetime, to manage at her control, or as she may think best, for herself and her children, in future, to contract debts and pay them out of the property as she may deem expedient, or to sell off the property as she thinks proper during her lifetime, and at her death" the remaining property to be sold and the proceeds divided amongst his children, he thus confers upon her power to dispose of the property in fee, which she may do by deed without the joinder of her then husband. (Ala.) *Young v. Sheldon*, 44.

6. MARRIED WOMEN—Execution of Power of Sale—Joinder of Husband.—A married woman may, without the assent or concurrence of her husband, execute a power conferred upon her to dispose of lands in fee by executing her sole deed thereof. (Ala.) *Young v. Sheldon*, 44.

See Gifts; Homesteads, 4-7.

IMPUTED NEGLIGENCE.

See Negligence, 5, 6.

INCEST.

1. CONSTITUTIONAL LAW—Incest.—A statute defining incest, without including actual knowledge on the part of the defendant of

his relation to the particeps criminis as a necessary element of guilt, is not unconstitutional. (Wash.) State v. Glindemann, 1001.

2. **CRIMINAL LAW—Incest—Information—Scienter.**—If a statute upon incest is silent as to any scienter, not using the words “knowingly,” “willfully,” or the like in describing the offense, it is not necessary to allege or prove that the defendant knew the relationship existing between him and the particeps criminis. (Wash.) State v. Glindemann, 1001.

3. **CRIMINAL LAW—Incest—Defense of Insanity—Evidence.**—If the defense of insanity is set up to charge of incest, the exclusion of the record of the appointment of a guardian for the defendant as being of unsound mind is not error if the record of the actual adjudication of his insanity made just prior to the guardianship proceeding has already been admitted in evidence. (Wash.) State v. Glindemann, 1001.

INDEPENDENT CONTRACTOR.

See Master and Servant, 26.

INDIOTMENT.

See Homicide, 3-5.

INFANTS.

ACTIONS—Parties—Suit for Infant.—If suit is prosecuted for an infant, it must run in the name of the infant, as plaintiff, by its guardian or next friend, and not in the name of the guardian or next friend for the infant. The infant is the real plaintiff. (Mo.) Jones v. Kansas City etc. R. R. Co., 434.

See Adoption; Master and Servant, 1.

INHERITANCE TAX.

See Taxation, 3, 4.

INJUNCTIONS.

In General.

1. **INJUNCTIONS—Jurisdiction to Issue.**—Courts of equity alone have power to issue injunctions, and they never exercise this power to allay mere apprehensions of injury, but only when the injury is imminent and irreparable. (Mo.) Schubach v. McDonald, 452.

2. **INJUNCTION—Jurisdiction—Writ of Prohibition.**—If the court has jurisdiction over the subject matter, it has the power to decide whether a petition for an injunction does or does not state a cause of action; and the mere failure of the petition to state a cause of action, or the defective statement of a good cause of action in no way affects the jurisdiction of the court, or justifies the issue of a writ of prohibition to prevent it from acting. (Mo.) Schubach v. McDonald, 452.

Ticket Brokers.

3. **INJUNCTION Against Ticket Brokers.**—Ticket brokers who assert a right to buy and sell nontransferable railroad tickets, issued and to be issued, notwithstanding their terms, and notwithstanding

the fact that the original purchaser can confer no rights upon anyone thereunder, thereby threaten to invade an existent property right of the railroad, which owing to the insolvency of the brokers and the nature of their business, will work irreparable injury to the railroad, and this entitles it to an injunction to prevent such brokers from so doing. (Mo.) *Schubach v. McDonald*, 452.

4. INJUNCTION Against Railroad Ticket Brokers.—There is an existent controversy concerning a legal subject matter between live parties presented for adjudication and within the jurisdiction of the court, where a petition for an injunction, together with the return of the rule to show cause, show that defendant ticket brokers have in their possession and intend to buy, and assert a property right in nontransferable tickets issued by a railroad company, and sold or to be sold to such brokers by original purchasers and which such brokers threaten to sell to others. (Mo.) *Schubach v. McDonald*, 452.

5. CONSTITUTIONAL LAW—Injunction Against Railroad Ticket Brokerage.—A court in granting an injunction restraining ticket brokers from buying and selling nontransferable railroad tickets, issued and to be issued, does not infringe upon the powers nor invade the province of the legislature. (Mo.) *Schubach v. McDonald*, 452.

6. INJUNCTION Against Ticket Scalping—Jurisdiction—Concrete Case.—A petition for an injunction against ticket brokers reciting that certain excursion tickets, mileage tickets and commutation tickets have been issued, or will be issued, from time to time by a railroad company, based upon a consideration of reduced rates, which by their express terms are to be good only in the hands of the original purchaser, and that it will be impossible, impracticable, or at any rate unbearably inconvenient, for the original purchaser to be identified and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride on such return ticket is the original purchaser or not; that it would be a fraud upon the railroad for anyone, except the original purchaser, to ride upon such return tickets, and a fraud for the original purchaser to sell such return tickets to the ticket brokers, and for such brokers to sell such return tickets to any third person to be by him so used, or upon the representation that they would entitle the buyer to so ride thereon; that, in the nature of things, the railroad could never ascertain that such frauds were about to be committed until after trains had departed and such tickets were presented to train conductors, and that it would then be too late to ask for or to receive injunctive relief against the perpetrators of such frauds, and that the ticket brokers are insolvent so that no adequate remedy at law could be had against them, and further, that even if such frauds could be discovered in time to ask specific relief in each case, it would involve the prosecution of a multiplicity of suits, and praying for an injunction to restrain ticket brokers from buying, selling, or dealing in such nontransferable tickets, states a concrete case as to tickets then held by ticket brokers, and presents a live subject matter, between live parties, which gives the court power and jurisdiction to issue the injunction, and a writ of prohibition will not lie to prevent the court from acting and issuing such injunction. (Mo.) *Schubach v. McDonald*, 452.

7. INJUNCTION Against Tickets Scalpers—Petition to Confer Jurisdiction.—A petition by a railroad company for an injunction against a ticket broker to restrain him from dealing in special tickets, which recite upon their face that they are issued at reduced rates
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and are nontransferable, but which do not relate to any particular occasion, states a concrete case which a court of equity has jurisdiction to hear and decide, and a writ of prohibition will not issue against it. (Mo.) *Schubach v. McDonald*, 452.

See Highways, 2.

INSANE PERSONS.

1. **CONTRACTS of Insane Persons.**—Idiots and persons of non-sane memory are not totally disabled either to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable, but not actually void. (N. Y.) *Blinn v. Schwarz*, 806.

2. **INSANE PERSONS.**—The Deed of a Lunatic Before Office Found is voidable only, and not void. (N. Y.) *Blinn v. Schwarz*, 806.

3. **INSANE PERSONS.**—The Deed of an Insane Person May be Ratified by Him if it was made while he was insane, and his agent, under a power of attorney, also executed during the insanity, received the consideration, and the principal, after becoming sane, sued such agent for an accounting and inserted allegations in the complaint which would have permitted a recovery of the money received by the agent for the conveyance. Though it does not appear by the complaint or otherwise that the principal knew when the action was brought that his agent had received such moneys, still this casts the burden of proof on such principal in an action of ejectment to recover the land so conveyed, and requires him to show that he did not ratify the conveyance after the termination of his insanity. (N. Y.) *Blinn v. Schwarz*, 806.

See Criminal Law, 1-8.

INSTRUCTIONS.

See Criminal Law; Trial, 3-8.

INSURANCE.

Employer's Indemnity.

1. **INSURANCE—Employer's Indemnity.**—If a policy of employer's liability insurance provides that if suit is brought against the assured to enforce a claim on account of an accident covered by the policy, the insurer will, on notice thereof, take charge of the litigation in the name and behalf of the insured, or settle it at its own cost, unless it elects to pay to the insured the indemnity, the assured being forbidden to settle any claim or incur any expense without the insurer's written consent, and the policy, also providing that no claim shall lie against the insurer under the policy, unless brought by the insured to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, the insurer, after taking control of proceedings in a suit against the assured, who is insolvent, cannot be discharged of liability, except by payment of the indemnity, or a settlement of the plaintiff's claim reduced to judgment. (N. H.) *Sanders v. Frankfort Marine etc. Ins. Co.*, 688.

2. **INSURANCE—Employer's Indemnity.**—If a policy of employer's liability insurance provides that no claim shall lie against the insurer on the policy unless brought by the assured to reimburse him for loss sustained and paid by him in satisfaction of a judgment, and that if the insured shall take control of proceedings in

an action to enforce a claim arising under the policy, he shall either pay the indemnity or secure the discharge of the insured, equity has jurisdiction to compel the insurer to pay the amount of the insurance in satisfaction of a judgment obtained by an employé against the insured, if the insurer has taken control of the proceedings as provided for in the policy, and has continued them to final judgment, though the insured was then insolvent and unable to pay such judgment, had made no claim for the insurance, and had incurred no expense nor made any payment on account of the litigation. (N. H.) *Sanders v. Frankfort Marine etc. Ins. Co.*, 688.

Fire Insurance.

3. **INSURANCE—Waiver of Proof of Loss.—Denial of Liability** by an insurer for a loss by fire constitutes a waiver of proof of such loss. (Ky.) *Home Ins. Co. v. Koob*, 354.

4. **INSURANCE, FIRE—Condition Against Other Insurance—Owner and Mortgagee.**—If an owner of property accepts a policy of fire insurance thereon, containing a condition that it shall be void if other insurance is taken on the insured property, the fact that the mortgagee of such property subsequently takes other insurance on his interest does not avoid the owner's insurance, especially when neither knew that insurance had been procured by the other. (Ky.) *Home Ins. Co. v. Koob*, 354.

5. **INSURANCE, FIRE—Misrepresentation—Burden of Proof.**—In the absence of fraudulent intent, the burden of proof is on an insurer to show that a misrepresentation by the insured as to the amount he owed on a mortgage on the property insured was material to the risk. (Ky.) *Home Ins. Co. v. Koob*, 354.

6. **INSURANCE, FIRE—Other Insurance—Contribution.**—If an owner and a mortgagee of the same property have procured insurance on their separate interests therein, and the owner seeks to recover on his policy, the defendant insurer is not entitled to contribution against the insurer of the mortgagee's interest. (Ky.) *Home Ins. Co. v. Koob*, 354.

Life Insurance.

7. **INSURANCE, LIFE—Insurable Interest.**—Insurance procured by one person upon the life of another in which he has no insurable interest, is against public policy and void as a wager contract. (N. H.) *Mechanicks Nat. Bank v. Comins*, 650.

8. **INSURANCE, LIFE—Insurable Interest.**—Any reasonable expectation of pecuniary benefit or advantage, either directly or indirectly, from the continued life of another, creates an insurable interest in such life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity. (N. H.) *Mechanicks Nat. Bank v. Comins*, 650.

9. **INSURANCE, LIFE—Insurable Interest.**—Insurance upon the life of the manager of a corporation, procured by one who furnishes funds to carry on the business, is not void for want of an insurable interest. (N. H.) *Mechanicks Nat. Bank v. Comins*, 650.

10. **INSURANCE, LIFE—Insurable Interest—Assignment.**—A policy of life insurance valid in its inception may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide and not a device to evade the law against wager policies. (N. H.) *Mechanicks Nat. Bank v. Comins*, 650.

11. INSURANCE, LIFE—Waiver of Conditions—Assignment.—A provision in a policy of life insurance that any claim thereunder by an assignee shall be subject to satisfactory proof of interest in the life of the insured is for the protection of the insurer, and waived by a formal admission of liability and payment of the money due into court, and is not available to one who asserts a claim to the proceeds of the policy adversely to an assignee thereof. (N. H.) *Mechanicks Nat. Bank v. Comins*, 650.

Murder of Insured.

12. BENEFIT SOCIETIES—Murder of Insured.—Although the beneficiary named in a certificate of a benefit insurance society, who murders or feloniously takes the life of the insured, cannot recover the benefit from such society, yet this does not release it from the payment of such benefit to anyone, in the absence of a contract provision to that effect. (Ill.) *Supreme Lodge etc. v. Menkhansen*, 239.

13. BENEFIT SOCIETIES—Murder of Insured.—Heirs at Law of an insured member of a benefit society, who is murdered by the named beneficiary are entitled, when named by statute, as within the class of eligible beneficiaries, to recover such insurance, nothing to the contrary appearing in the contract of insurance, or in the state law. (Ill.) *Supreme Lodge etc. v. Menkhansen*, 239.

14. BENEFIT INSURANCE—Parties to Action to Recover.—If the statute determines the persons entitled to the insurance on the life of a murdered member of an insurance benefit society, suit to recover such benefit is properly brought in the names of such persons, and need not be brought by the administrator of the estate of the deceased member. (Ill.) *Supreme Lodge etc. v. Menkhansen*, 239.

Mutual Benefit Insurance.

15. BENEFIT SOCIETY—Relation to Members.—A benefit society sustains a relation to its members other than that of a mere life insurance company; the fund raised is practically a trust fund made up of their contributions. (Pa. St.) *Blair v. Supreme Council etc.*, 934.

16. BENEFIT SOCIETY—Payment of Less than Face of Certificate.—If a widow presents her husband's death certificate of five thousand dollars to a benefit society for payment, without knowledge that after the issuance of the certificate it had been enacted by by-laws that two thousand dollars should be the highest amount paid upon any death, and surrenders the certificate and accepts nineteen hundred dollars on the representation that this is all she is entitled to, she may maintain a bill in equity against the society to compel the return of the certificate, to make discovery of the condition of the emergency fund, and to pay the face of the certificate, less the amount already received. (Pa. St.) *Blair v. Supreme Council etc.*, 934.

INTEREST.

See Usury.

IRRIGATION.

See Eminent Domain; Taxation, 2; Waters and Watercourses, 1-3.

JUDGMENTS.*In General.*

1. **JUDGMENT-ROLL**—The Order for Publication of Summons is no part of the judgment-roll. (Cal.) *McHatton v. Rhodes*, 125.

2. **JUDGMENT as Evidence Pending Appeal**—If a defendant appeals from a judgment before a sheriff's deed is made to the plaintiff, or a sale made by him to a third person, the effect of the judgment as evidence of the matters determined by it is suspended, even though its execution is not stayed. (Cal.) *Di Nola v. Allison*, 84.

Jurisdiction.

3. **JUDGMENTS—Presumption of Jurisdiction**—A recital of due service of process in a judgment by a superior court raises a presumption of a valid service, and a person attempting to avoid such judgment must show that no legal service was made. (Wash.) *Ballard v. Way*, 993.

4. **JUDGMENT—Presumption as to Publication of Summons**—If a judgment of a sister state recites that the defendants were duly notified by publication more than thirty days before the first day of the term of court, it must be presumed that an order was made for the publication, and that notice was given as the law of that state provides. (Cal.) *McHatton v. Rhodes*, 125.

5. **JUDGMENTS of Justices of the Peace—Jurisdiction Based on Forgery**—When a contract as sued upon contains a stipulation making it payable at a specified place, which stipulation, if genuine, would give the justice of the peace at that place jurisdiction, and it is there sued upon and judgment rendered by default, such judgment is void if such stipulation was in fact a forgery, being added to the contract after its execution without the authority of the maker. (Iowa.) *Cooley v. Barker*, 276.

Foreign Judgments.

6. **JUDGMENTS—Foreign—Collateral Attack**—A judgment of a court of another state is conclusive against collateral attack as to whether the complaint was such as to warrant a personal judgment. (Iowa.) *American Trading etc. Co. v. Gottstein*, 319.

7. **JUDGMENTS—Foreign—A Demurrer to a petition alleging that a personal judgment was entered by the court of another state in conformity with the law thereof, is an admission for the purpose of deciding on the merits of the demurrer, that such judgment was warranted by the pleadings.** (Iowa.) *American Trading etc. Co. v. Gottstein*, 319.

8. **JUDGMENT Against Nonresident—Jurisdiction**—The Presumption of verity attending the decision of a court of general jurisdiction on the question of its jurisdiction applies to a judgment of a sister state obtained against nonresidents by publication, although the order for publication does not appear in the record. (Cal.) *McHatton v. Rhodes*, 125.

Personal and Deficiency Judgments.

9. **JUDGMENTS—Pleadings in Equity**—Prayer for general relief in a complaint in equity will sustain a personal judgment. (Iowa.) *American Trading etc. Co. v. Gottstein*, 319.

10. **JUDGMENTS—Deficiency—Personal Judgment**—A judgment determining the amount due, establishing a lien and decreeing a

sale of property to pay the debt, and directing a holding of the surplus, until the further order of the court, is not a final, but an interlocutory, judgment, and, in case of deficiency, a personal judgment may be rendered therefor by subsequent decree. (Iowa.) *American Trading etc. Co. v. Gottstein*, 319.

Res Judicata and Estoppel.

11. **JUDGMENT—Estoppel Extends to Premises.**—If a judgment is necessarily drawn from certain premises, they are as conclusive as the judgment itself. (Neb.) *Shelby v. Creighton*, 630.

12. **JUDGMENTS—Res Judicata.**—The decision on appeal from an order continuing until the time of the hearing of an injunction restraining trespass, as to the effect of a judgment in another action and subsequent partition proceedings is not the law of the case, so as to be conclusive on appeal from the final judgment in the trespass suit. (N. C.) *Carter v. White*, 853.

Vacation and Relief.

13. **JUDGMENT—Vacation for Fraud and Imposition.**—A suit in equity to set aside a decree for fraud and imposition cannot be maintained where the evidence fails to show that the plaintiff was not as fully cognizant of the manner in which the decree was obtained at the time of its entry as she was when the suit for relief was commenced. (Neb.) *Shelby v. Creighton*, 630.

14. **JUDGMENT, Relief from in Equity—Laches.**—A party cannot be denied relief from a void judgment, because of laches, where there has been no attempt to enforce it, because, until then, the complainant had no occasion to act. (Iowa.) *Cooley v. Barker*, 276.

15. **JUDGMENT, Relief Against, Though It is Shown that the Defendant was not Indebted.**—In a suit to enjoin the enforcement of a judgment on the ground that it is void, the complainant is not required to show that he is not indebted on the cause of action which was the basis of the suit. (Iowa.) *Cooley v. Barker*, 276.

See Appeal and Error, 11-14; Partition.

JUDGMENT-ROLL.

See Judgments, 1.

JUDICIAL SALE.

See Appeal and Error, 11-14; Executions, 3, 4; Executors and Administrators, 4-8.

JURISDICTION.

See Judgments, 2-8.

JURY.

JURORS—Examination as to General Qualifications—Waiver. In a criminal prosecution it is not error to fail to require the prosecuting attorney to examine the jurors as to their general qualifications. Either the prosecutor or the defendant may waive his right

to so examine the jurors, or waive any disqualification in any juror.
(Wash.) *State v. Clark*, 1006.

See Criminal Law, 19, 20.

JUSTICE OF PEACE.

See Judgments, 5.

LABOR LAWS.

See Constitutional Law, 6-8.

LAKES.

See Waters and Watercourses, 4, 5.

LANDLORD AND TENANT.

LANDLORD AND TENANT—Returning Premises in Good Order.—A provision in a lease that the tenant shall return the premises in as good condition as when received, "loss by fire, inevitable accident, or ordinary wear excepted," obligates the tenant, upon the termination of the lease by agreement after a fire, to remove the debris and rubbish resulting from the partial burning of his goods. (Minn.) *Boardman v. Howard*, 409.

Note.

Larceny, possession of recently stolen property as evidence of, 482, 485, 492.

LEASE.

See Landlord and Tenant.

LETTERS.

See Evidence, 4, 5.

LIBEL AND SLANDER.

1. **NEWSPAPER LIBEL**.—The Proprietor of a Newspaper is Liable for All that Appears in Its Columns, although the publication may have been made in his absence and without his knowledge. (N. Y.) *Crane v. Bennett*, 722.

2. **LIBEL**—Evidence of Malice.—The falsity of a libel is sufficient evidence of malice. (N. Y.) *Crane v. Bennett*, 722.

3. **LIBEL**—Malice—Exemplary Damages.—Though Defendant Testifies and Produces Evidence Tending to Show that there was No Actual Malice, yet if the plaintiff proves the publication of the libel and that it is false, the judge should submit to the jury, as a question of fact, whether malice existed in the publication, and if the jury is of the opinion that it did exist, exemplary damages may be awarded. (N. Y.) *Crane v. Bennett*, 722.

4. **DAMAGES, EXEMPLARY**, for Act of a Servant or Employé. When the proprietor of a newspaper surrenders to his general manager and employé all his business affairs or the general management of some particular business, and absents himself from the jurisdiction

where his paper is edited and published, leaving such manager in entire charge thereof, the proprietor is responsible for the manner in which his business is conducted, and if a libelous publication is wanton, reckless, or heedless of the feelings of the person libeled, and, upon being apprised of the recklessness of the charges, there is a continued refusal to make or publish any retraction, such proprietor is liable for such punitive damages as the jury in its discretion may award. (N. Y.) *Crane v. Bennett*, 722.

Note.

Libel, damages, exemplary for though due to the act of a servant, 753-760.

malice in publication of, when imputed to the proprietor of a newspaper, 758.

retraction of, refusal to publish, 758, 759.

LICENSE TAX.

See **Municipal Corporations**, 3.

LIFE ESTATES.

See **Adverse Possession**.

LIMITATION OF ACTIONS.

1. **STATUTES** of Limitation furnish a defense as meritorious as any other. (Ala.) *Nelson v. First Nat. Bank*, 52.

2. **PLEADINGS—Amendment—Plea of Limitation.**—An amendment to a complaint, in order to come within the doctrine of relation back to the commencement of the suit, and cut off the plea of the statute of limitations, must be but a varying form or expression of the claim or cause of action sued on, and the subject matter of the amendment must be wholly within the lis pendens of the original suit. (Ala.) *Nelson v. First Nat. Bank*, 52.

3. **PLEADINGS—Amendment—Plea of Limitation.**—If the matter introduced by way of amendment to a complaint, although it be such as might have been joined in a different count in the original complaint, introduces a new claim, or a new cause of action, requiring a different character of evidence for its support, and affording a different defense from that to the cause as originally presented, it will not relate back to the commencement of the suit, so as to prevent the plea of the statute of limitations to the new matter thus introduced. (Ala.) *Nelson v. First Nat. Bank*, 52.

4. **PLEADINGS—Amendment—Plea of Limitation.**—Plaintiff may introduce a new cause of action, or a new right or claim arising out of the same transaction, by amendment to his complaint, but such amendment cannot have relation back to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate as a bar to a new suit commenced for that cause of action at the time of making such amendment. (Ala.) *Nelson v. First Nat. Bank*, 52.

5. **PLEADINGS—Departure by Amendment—Plea of Limitation.** In determining whether an amendment to a complaint asserts new matter for a new claim, and relates back to the commencement of the suit so as to cut off the plea of the statute of limitations, the true

test is whether the matter set up in the amendment amounts to a departure in after pleading, and if it does, the amendment cannot thus relate back. (Ala.) *Nelson v. First Nat. Bank*, 52.

6. PLEADING—Departure by Amendment—Plea of Limitation. A complaint setting up a claim for money had and received, and by amendment setting up a claim for goods sold and delivered, growing out of the same transaction, presents a departure in after pleading, and such amendment cannot relate back to the time of the commencement of the suit, so as to cut off the plea of the statute of limitations as to the matter set up in such amendment. (Ala.) *Nelson v. First Nat. Bank*, 52.

See Adverse Possession; Counties; Municipal Corporations, 9.

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LIS PENDENS.

1. **LIS PENDENS**.—The Purpose of the Rule of *Lis Pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting relief sought. (Neb.) *Merrill v. Wright*, 645.

2. **LIS PENDENS**—Independent Titles.—The rule of *lis pendens* has no application to independent titles not derived from any of the parties to the suit nor in succession to them. (Neb.) *Merrill v. Wright*, 645.

3. **LIS PENDENS**—Statutory Scope of.—Section 85 of the Nebraska Code of Civil Procedure does not extend the rule of *lis pendens* so as to include all interests acquired by third persons pending suit, whatever their nature or source. (Neb.) *Merrill v. Wright*, 645.

MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION of Civil Action.—An action will not lie for the prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person, or attachment of the property of the defendant, and no special injury sustained which would not necessarily result in all prosecutions for like causes of action. (Wash.) *Abbott v. Thorne*, 1021.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Infant Employee.

1. **EMPLOYMENT of Infant in Violation of Law**.—If injury results to an infant employé in a sawmill from a failure properly to guard dangerous machinery, his employer, who has not procured a certificate from the school authorities permitting the employment, as required by statute, is *prima facie* liable in damages. (Minn.) *Perry v. Tozer*, 416.

Negligence of Employer.

2. **MASTER AND SERVANT—Negligence**.—Direct Evidence is not necessary to show due care on the part of an employé at the time of an accident and injury to him. The fact that he is in the exercise of due care may be inferred from circumstances, if there is no evidence of his negligence. (N. H.) *Murray v. Boston etc. R. R.*, 660.

3. **MASTER AND SERVANT—Negligence—Evidence**.—Proof of the mere fact that a servant was injured in the master's service is not sufficient to make out a *prima facie* case for his recovery. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

4. RAILROADS—Negligence—Loose Cars—Burden of Proof.—If loose and unattended cars run on to a main railroad track imperiling the life or safety of an engineer in charge of a train on the main track, and in the due performance of his duty, it must be presumed that the company did not exercise reasonable care to prevent its loose cars from escaping, and the burden of proof is on it to explain the situation, and to show that it performed its duty in endeavoring to prevent such loose cars from escaping. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

5. RAILROADS—Negligence—Maintenance of Derail Switch.—The fact that a railroad company does not maintain a "derail" switch to prevent loose cars on a sidetrack from escaping onto the main track is not per se negligence. The law imposes upon the railroad company only reasonable care in such case, and does not require it to furnish absolutely safe or even the best known appliances. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

6. RAILROADS—Negligence—Failure to "Fasten and Secure" Cars.—An instruction authorizing a recovery for an injury to a railroad employé caused by the escape of loose cars from a sidetrack to the main track, if the railroad company "negligently failed and omitted to fasten and secure said cars on said switch or sidetrack, and that by reason of said negligent failure and omission said cars escaped from said sidetrack," is not open to the objection that the words "fasten and secure" imply the duty of making such cars absolutely incapable of getting loose or escaping. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

Assumption of Risks.

7. MASTER AND SERVANT—Assumption of Risks.—If one of ordinary intelligence engaging in an employment obviously dangerous, knows the manner in which it is to be carried on and consents thereto, being familiar with the conditions and surroundings, and aware that his own work and that of his fellow-workmen will constantly change its character, rendering it alternately safe and dangerous, he assumes the risks incident to the employment. (Utah.) *Christienson v. Rio Grande Western Ry. Co.*, 945.

8. MASTER AND SERVANT—Assumption of Risks.—An employer may carry on his business in any way he may choose, although another method would be less dangerous, and if his employé knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he assumes the risks of the more dangerous method. (Utah.) *Christienson v. Rio Grande Western Ry. Co.*, 945.

9. MASTER AND SERVANT—Assumption of Risks.—An employé who engages in any service, and consents to the manner in which it is performed, aware of the conditions and the dangers incident to the employment, and voluntarily undertaking to perform the service at the place of injury, assumes the ordinary risks thereof. (Utah.) *Christienson v. Rio Grande Western Ry. Co.*, 945.

10. MASTER AND SERVANT—Assumption of Risks.—If a servant proceeds under the order of his master or superior servant in performing an act whereby he is exposed to unusual danger, the master is liable for the resulting injury to the servant, unless the risk of the act was fully realized by the latter, or was so apparent that no man of ordinary prudence, situated as he was, would have undertaken it. (Ky.) *Long v. Illinois Cent. R. R. Co.*, 374.

11. MASTER AND SERVANT—Risk Assumed Under Superior's Order.—A section hand in obeying the order of his section boss to ride on a hand-car to his place of work, when both knew that a fast train was overdue, but neither knew its whereabouts, does not assume the risk of injury from a collision therewith, unless the danger was so obvious that a man of ordinary prudence, situated as such servant was, would not have obeyed such order, and this is a question for the jury to determine. (Ky.) *Long v. Illinois Cent. R. R. Co.*, 374.

12. MASTER AND SERVANT—Assumption of Risks—Negligence.—An employé operating a locomotive on a railroad assumes the ordinary risks incident to that business, and if injured through an accident incident to such business, without fault of the company, cannot recover. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

13. RAILROADS—Negligence—Assumption of Risks—Burden of Proof.—Danger of a collision by a regular railroad train with cars running loose, and unattended from a sidetrack to the main track, is not one of the ordinary risks incident to the business of engineer in charge of the train on the main track, and in such event the burden of proof is on the railroad company to explain the cause of such collision and resulting injury to the engineer. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

14. RAILROADS—Negligence—Obvious Danger—Assumption of Risks.—The fact that a railroad company does not maintain a "derail" switch on a sidetrack to prevent loose cars thereon from escaping onto the main track, is not such an obvious danger as to constitute it negligence for an engineer in charge of a regular train running on the main track to continue in the service of the company after knowledge of the absence of such "derail" switch. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

15. MASTER AND SERVANT—Assumption of Risk.—A railroad employé does not assume the risk of accident from proximity of a jigger-stand to a switch when he has no knowledge of it, and is not chargeable with such knowledge in the exercise of ordinary care in the performance of his duties. (N. H.) *Murray v. Boston etc. R. R.*, 660.

16. MASTER AND SERVANT—Assumption of Risk.—Knowledge by a brakeman of a jigger-stand in close proximity to a switch is not shown by the fact that he has been over the railroad a number of times within a short period before the accident, when such stand is not so conspicuous as to necessarily attract his notice, and men who have worked with him during that time have not noticed it. (N. H.) *Murray v. Boston etc. R. R.*, 660.

17. MASTER AND SERVANT—Assumption of Risks.—The fact that jigger-stands are frequently placed along railroad tracks does not charge a railroad employé with notice that one may be near a switch, when they usually lead into carhouses and are not generally placed near switches. (N. H.) *Murray v. Boston etc. R. R.*, 660.

Safe Place to Work.

18. MASTER AND SERVANT—Assumption of Risks—Safe Place to Work.—If a servant assents to occupy the place assigned him in which to work, and incur all the dangers, incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the master's duty to furnish the servant with a safe place in which to work. (Utah.) *Christienson v. Rio Grande Western Ry. Co.*, 945.

19. MASTER AND SERVANT—Assumption of Risks.—If an experienced employé of ordinary intelligence at work on a gravel bank voluntarily selects a place to stand that is obviously dangerous, being familiar with the bank, its conditions and surroundings, the character of the materials of which it is composed, knowing that it was undermined at the particular place where he is working, and aware that the bank might cave and fall at any moment, he assumes the risk of injury therefrom and cannot recover therefor, especially when he had worked at the bank in the same capacity on numerous previous occasions, and was as familiar with it, its condition, and the manner in which operations were carried on as his employer. (Utah.) *Christienson v. Rio Grande Western Ry. Co.*, 945.

Fellow-servants.

20. RAILROADS—Negligence—Fellow-servants.—An engineer in charge of a regular railroad train on a main track is not a fellow-servant with other employés of the company, intrusted with the duty of preventing loose cars from escaping from the sidetrack to the main track in an ordinary storm by putting brakes on or blocking them to prevent their escape. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

21. MASTER AND SERVANT—Fellow-servants.—The Foreman of employés of a common master engaged in a common employment of erecting a building is a fellow-servant with them while directing or assisting them in the performance of the duties of the common employment, and the master is not liable for the negligence of such foreman resulting in injury to one of such common employés, except when his acts relate to personal duties due the employé from the master, and from which he cannot escape liability by delegating them to another. (N. J. L.) *Enright v. Oliver*, 710.

22. MASTER AND SERVANT—Negligence of Fellow-servant.—Employés of a common master engaged in a common employment of erecting a building or other structure are all fellow-servants, and if injury occurs to one of such employés by reason of negligent construction, caused by the carelessness of a coemployé, the master is not liable. (N. J. L.) *Enright v. Oliver*, 710.

23. MASTER AND SERVANT—Negligence of Fellow-servant.—If the master has furnished a sufficiency of safe appliances to select from in the construction of a building, he is not liable for an injury to an employé arising from the selection by a fellow-servant of an imperfect appliance not furnished by the master. (N. J. L.) *Enright v. Oliver*, 710.

24. MASTER AND SERVANT—Negligence of Incompetent Fellow-servant—Assumption of Risks.—If an injury to an employé grows out of the negligence of his incompetent fellow-servant, and the conditions and his incompetency were known to the injured employé, or should have been known to him by the exercise of ordinary care before exposing himself to the danger complained of, and yet without notice to the master, or seeking in any way to remedy such conditions, he continued in the employment which resulted in the injury, he must be held to have assumed the risk as an obvious one, and cannot recover of the master. (N. J. L.) *Enright v. Oliver*, 710.

25. MASTER AND SERVANT—Fellow-servants—Assumption of Risks.—Servants employed by or under the control of the same master, in a common employment, obviously exposing them to injury from the negligence of others so employed or controlled, although engaged in different departments of the common business, are fellow-servants,

who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom. (N. J. L.) *Enright v. Oliver*, 710.

Independent Contractor.

26. INDEPENDENT CONTRACTOR, Liability of Land Owner for Negligence of.—If the owner of property employs another to build a house thereon, and the latter causes sand to be hauled and piled up in the street in front of the premises, and negligently leaves the pile of sand unmarked by danger signals of any kind, whereby another driving along the street, at night, in a buggy, is overturned and injured, the land owner is not liable, because the negligence is not that of a servant, but of an independent contractor. (Iowa.) *Hoff v. Shockley*, 289.

See Constitutional Law, 6-8.

Note.

Master and Servant, acts of servant, when deemed to be in the course of his employment, 738, 739.

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exemplary damages against masters for negligent sales of poisons by servants, 765.

exemplary damages against masters for publication of libel by servants, 752-758.

exemplary damages against masters for trespass committed by servants, 767-772.

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relation of, when exists, 733, 734.

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MENTAL SUFFERING.

See Damages; Telegraphs and Telephones.

MONOPOLIES.

A MONOPOLY in the Sale of Books not Protected by Copyright offends against the laws of the state of New York providing that every agreement, contract, arrangement, or combina-

tion whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, and illegal and void. Hence, an agreement between members of an association of publishers and booksellers, whereby persons selling copyrighted books at a price less than that fixed by the association are excluded from selling books altogether, whether copyrighted or not, offends against this statute, and cannot be upheld on the ground that its only object is to punish those who refuse to be bound by the wishes of the owners of books which are protected by copyright. (N. Y.) *Straus v. American Publishers' Assn.*, 819.

MORTGAGES.

1. **MORTGAGE—Consideration.**—The Contingent Liability of a principal to his sureties is sufficient consideration for a mortgage given to indemnify them after the execution and delivery of the bond, and before any breach. (Neb.) *County of Harlan v. Whitney*, 610.

2. **MORTGAGE—Parol Evidence to Explain.**—If a deed recites that the grantee is trustee for the sureties on the bond of the grantor, parol evidence is admissible to identify the sureties and the obligation referred to. (Neb.) *County of Harlan v. Whitney*, 610.

3. **MORTGAGE to Indemnify Sureties—Validity.**—A mortgage given by a county treasurer to indemnify the sureties on his bond is not void because at the time of its execution he was suspected of embezzlement, and it was given to protect them against consequent liability. (Neb.) *County of Harlan v. Whitney*, 610.

4. **MORTGAGE—Effect of Transferring Note Secured.**—A real estate mortgage given to secure a negotiable note is mere incident to the debt, and passes with a transfer of the note. (Neb.) *Consterdine v. Moore*, 620.

5. **MORTGAGE and Note Secured—Notice to Purchaser.**—When a note and the mortgage securing it, together with an assignment of the mortgage, are sold and delivered, the purchaser must take notice of the provisions in the papers. (Neb.) *Consterdine v. Moore*, 620.

6. **MORTGAGES—Estoppel.**—If an owner of land executes a first and second mortgage thereon, and, upon default, there is a foreclosure by both of the mortgagees, the mortgagor is estopped to dispute the title conveyed by his second mortgage. (Ala.) *Graham v. Partee*, 32.

MUNICIPAL CORPORATIONS.

Legislative Interference With Government.

1. **CONSTITUTIONAL LAW—Right to Local Self-government.**—Municipal corporations have a right to local self-government, and it is not within the power of the legislature to permanently fill by appointment and fix the compensation of the local or municipal offices established by law for purely local purposes. (Ky.) *Lexington v. Thompson*, 361.

2. CONSTITUTIONAL LAW—State Interference with Municipal Government.—A statute fixing the compensation to be allowed the officers and members of a municipal fire department, created for purely local purposes, is void as violative of the right of the municipality to govern and control its purely local affairs. (Ky.) *Lexington v. Thompson*, 361.

License Tax.

3. MUNICIPAL CORPORATIONS—Contracts by—Ultra Vires.—An agreement by a municipal corporation to limit the amount of license tax to be exacted of a water company during the term of a contract to supply water, if made without legislative sanction, is ultra vires, and void. (Ala.) *Mayor of Birmingham v. Birmingham etc. Co.*, 49.

Water and Light Plants.

4. MUNICIPAL CORPORATIONS—Subject of Necessary Expense.—A city or town has power to incur an indebtedness for the erection and operation of plants for the supply of water and electric lights for municipal use and to sell to its inhabitants as a necessary municipal expense without the approval of the proposition by a majority of the qualified voters of the municipality. (N. C.) *Fawcett v. Mount Airy*, 825.

Streets.

5. STREETS—Rights of Abutting Owners.—The right of the owner of a lot in a city or town to the use of the street and to damages for its obstruction does not depend on his ownership of any of the soil under the street. His right flows from the fact that his lot abuts on the public street. (Mo.) *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 524.

6. STREETS—Abutting Owners—Easements—Compensation.—An abutting owner on a public street has an easement therein of light, air, and access to and from his property by means of such street, of which he cannot be deprived without compensation. (Mo.) *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 524.

7. STREETS—Surface Railroads in—New Servitude.—The construction and maintenance of a steam or street railroad on the grade of a street in pursuance of municipal authority, the municipal corporation having power to grant it is not a new or additional servitude on the land upon which the street is constructed, and falls within the use contemplated when the street was laid out or acquired by the public. (Mo.) *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 524.

8. STREETS—Elevated Railroads Therein—New Servitude.—An elevated steam railroad, constructed on permanent pillars or arches in a public street by consent of the municipality, so as to shut out the light and air of abutting owners and interfere with the free use of the street, and their access to and from their premises, is a new and additional servitude, and one not in contemplation when the street was acquired or laid out, and one which entitles them to just compensation for any depreciation in the value of their property caused by the construction and maintenance of such railroad. (Mo.) *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 524.

9. STREETS—New Servitude Therein—Limitation of Action.—An action by abutting property owners on a public street to recover

for damages to their property caused by the construction of an elevated railroad therein is barred by limitation in five years after such construction has become permanent and complete. (Mo.) *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 524.

See *Quo Warranto*.

Note.

Municipal Corporations, statutes of limitation, whether applicable to suits and actions by, 157, 175-177.

MURDER.

See *Homicide*; *Insurance*.

NEGLIGENCE.

In General.

1. **NEGLIGENCE, CONTRIBUTORY**—*Concurrent Negligent Acts.* The rule that a plaintiff's contributory negligence does not bar his right to recover where the defendant, after discovering his danger, fails to use ordinary care to avoid injuring him, has no application when both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it. (Cal.) *Green v. Los Angeles etc. Ry. Co.*, 68.

2. **NEGLIGENCE, CONTRIBUTORY**—*Right to Recover.*—A plaintiff may recover notwithstanding his contributory negligence, when the defendant is guilty of negligence in seeing the plaintiff's peril, and though owing him a duty and being able with ordinary care to avoid such peril, yet recklessly and wantonly inflicts injury upon him. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

3. **NEGLIGENCE**—*Accident—Evidence.*—The manner of the occurrence of an accident, as disclosed by the evidence, may warrant an inference in favor of the person injured, that he had no knowledge of a defective appliance which caused the accident. (N. H.) *Murray v. Boston etc. R. R.*, 660.

4. **NEGLIGENCE**—*Petition Omitting the Word "Negligence."*—If, in an action for personal injuries, the inference of negligence is inevitable from the facts narrated in the petition, the omission of the word "negligence" in the pleading does not render it defective. (Neb.) *Geneva v. Burnett*, 628.

Imputed Negligence.

5. **NEGLIGENCE**—*Imputable.*—The negligence of the driver of a vehicle cannot be imputed to a passenger or guest riding therein. (N. C.) *Duval v. Atlantic Coast Line R. R. Co.*, 830.

6. **NEGLIGENCE**—*Imputable.*—One who is injured by the joint or concurring negligence of a private person with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, so as to prevent recovery for an injury received. (N. C.) *Duval v. Atlantic Coast Line R. R. Co.*, 830.

Rescuing from Danger.

7. **NEGLIGENCE, Contributory in Attempting a Rescue.**—One who seeks to rescue another from imminent danger, thereby imperiling his own life, is not necessarily guilty of contributory negligence. He who springs to the rescue of another, encountering great danger

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to himself, is not to be denounced as negligent, but the propriety of his conduct is to be left to the judgment of the jury. (Iowa.) Saylor v. Parsons, 283.

8. **NEGLIGENCE, Recovery for Injuries Suffered in Attempting a Rescue.**—An employé who, in attempting to rescue one of his employers from immediate danger, is himself injured, cannot recover from his employers or the one rescued, unless it appears that he or they were guilty of some negligence toward such rescuer. (Iowa.) Saylor v. Parsons, 283.

9. **NEGLIGENCE in Placing One's Self in Peril Resulting in Injury to the Rescuer.**—One who places himself in peril is not guilty of negligence toward another which entitles the latter to recover for injury suffered in attempting to rescue the former from his peril. (Iowa.) Saylor v. Parsons, 283.

Dangerous Premises.

See Party-walls, 2-4.

10. **NEGLIGENCE—Dangerous Premises.**—By a *Mere Licensee* is meant one who has the tacit permission or privilege of entering upon the premises of another, but without invitation, express or implied; under such circumstances a person enters at his own risk, and must take the premises in the condition in which he finds them. (Minn.) Klugherz v. Chicago etc. Ry. Co., 384.

11. **NEGLIGENCE—Dangerous Standing Walls—Notice of.**—An adjoining owner, who has notified the owner of a dangerous standing wall of its insecure condition, is not guilty of contributory negligence in not taking means to prevent such wall from falling, to his injury and resulting damage. (Ill.) Beidler v. King, 246.

12. **NEGLIGENCE—Dangerous Standing Walls—Notice of.**—An adjoining owner, who has notified the owner of a dangerous standing wall of its insecure condition, is not guilty of contributory negligence in not taking means to prevent such wall from falling, to his injury and resulting damage. (Ill.) Beidler v. King, 246.

See Damages; Death; Highways; Master and Servant: Railroads.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

Note.

Newspapers, libel, liability of to exemplary damages for publishing, 753-760.

NEW TRIAL.

NEW TRIAL—Sufficiency of Statement.—An objection that the statement on motion for a new trial does not sufficiently specify the particulars in which the evidence is insufficient to justify the decision, will be overruled when it is stated therein: "The foregoing constitutes substantially all the evidence given upon the trial." (Cal.) Di Nola v. Allison, 84.

NUISANCE.

See Constitutional Law, 14.

OFFICERS.

PUBLIC OFFICER—Payment of Salary to a De Facto Officer as a Defense to an Action by an Officer De Jure.—If the salary is

paid to an officer de facto during his incumbency in the office, but while an action contesting his right is pending, which finally terminates in an action declaring another to be, and to have been, entitled to the office, the latter cannot recover such salary from the county so paying it. (Iowa.) *Brown v. Tama County*, 296.

See Principal and Surety.

PAROL EVIDENCE.

See Evidence, 8-10; Frauds, Statute of.

PARTIES.

1. **ACTIONS—Unnecessary Parties.**—If a statute declares that a trustee of an express trust may sue in his own name without joining the person for whose benefit the suit is prosecuted, the joining of such beneficiary, if not forbidden by statute, is unnecessary, but not fatal to the action. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

2. **ACTIONS—Unnecessary Party.**—An unnecessary party to an action may be dropped at any time without affecting the rights of necessary parties and the presence of the unnecessary party in the case is not ground for a reversal of the judgment. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

See Death, 2; Executors and Administrators, 4; Infants.

PARTITION.

1. **PARTITION—Cotenancy.**—Compensation allowed for improvements made by one cotenant without the knowledge of the others should, on partition, be so estimated as to inflict no injury upon the cotenant against whom the improvements are charged. (Ill.) *Heppe v. Szczepanski*, 221.

2. **WILLS—Partition by Heirs.**—Where a testator devises land to his wife for life, in trust for their children and directs the executor, after her death, to sell the property and divide the proceeds among the children, their title is insufficient to maintain partition as heirs at law of the testator. (Cal.) *Bank of Ukiah v. Rice*, 118.

3. **PARTITION.**—Judgment in partition determining the respective interests of parties thereto is binding on them as against an after-acquired title. (N. C.) *Carter v. White*, 853.

Note.

Partition, judgment in, adverse claims of title whether may be determined by, 872, 873.

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- Partition**, judgment in, improvements, claims for, when necessarily settled by, 873.
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- judgment in, inchoate interests perfected subsequently, whether bound by, 876, 877.
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- judgment in, unknown owners, effect of proceedings against, 870.
- judgment in, warranty of title, whether implied by, 875.
- judgment in, wife of cotenant, when bound by, 866.
- sales in, effect of upon liens and on rights of dower, 866-868.

PARTNERSHIP.

1. **PARTNERSHIP—Real Estate—Parol Evidence of Title.**—It is not competent, in order to affect the title or possession of land, to show by parol that a deed to two persons as tenants in common was purchased and paid for by them as partners and is partnership property; purchasers and creditors alike may rely on the title to real estate as shown by the record. (Pa. St.) *Cundey v. Hall*, 938.
2. **PARTNERSHIP—Real Estate—Creditors of a Partnership** whose members hold land as tenants in common cannot enforce payment of their claims out of the land as against individual creditors of the partners; the latter are entitled to have their claims first satisfied out of the proceeds of the property. (Pa. St.) *Cundey v. Hall*, 938.
3. **PARTNERSHIP—Real Estate.—As Between Partners** themselves real estate purchased with partnership funds and for partnership purposes is partnership property and may be shown to be such, notwithstanding the deed was made to the individuals composing the firm as tenants in common. (Pa. St.) *Cundey v. Hall*, 938.
4. **PARTNERSHIP—Real Estate.—A Judgment Creditor** may, in order to satisfy a balance still due after selling his debtor's interest in a partnership, take the debtor's share of the proceeds of real estate held by him and his partner as tenants in common, as against the purchaser of the partnership interest. (Pa. St.) *Cundey v. Hall*, 938.

PARTY-WALLS.

1. **PARTY-WALLS—Construction of Agreement for Repairs.**—A party-wall agreement, providing that if repairs are necessary after

one of the parties has used or paid for his portion of the wall, the expense shall be borne equally by the parties to the extent that they are each using the wall, imposes no obligation on the first-named party to repair or pay for repairs to any portion of the wall not used by him. (Ill.) *Beidler v. King*, 246.

2. PARTY-WALLS—Partial Destruction—Liability for Dangerous Condition.—If a party-wall is built partly on the land of an adjoining owner, its partial destruction and weakening by fire do not divest the builder of his interest in the land of such adjoining owner so as to render the latter the sole owner of that part of the wall standing on his land, and make him liable for its dangerous condition. (Ill.) *Beidler v. King*, 246.

3. PARTY-WALLS—Liability for Dangerous Condition.—A part owner of a party-wall who negligently permits it to stand after its partial destruction and weakening by fire is liable to another part owner who is using part of the wall for damages resulting to the latter from a falling of another portion of the wall in which he has no interest and is not using. (Ill.) *Beidler v. King*, 246.

4. PARTY-WALLS—Right to Prevent Injury from Falling of.—If a party-wall agreement gives to one party no right to use or deal with any portion of the wall until he shall have paid one-half of the cost thereof, he has no right to go upon the adjoining premises for the purpose of bracing a portion of the wall, not used or paid for him, to prevent it from falling upon his property. (Ill.) *Beidler v. King*, 246.

PASSENGERS.

See Carriers.

PAYMENT.

See Accord and Satisfaction; Bills and Notes, 5; Principal and Agent.

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PENALTIES.

1. PENAL ACTIONS—Burden of Proof.—In a penal action to recover a penalty for not stopping at a crossing, as required by the statute, the burden of proof is on the prosecution to show that the failure to so stop was due to the fault of the defendant. (Iowa.) *State v. Chicago etc. Ry. Co.*, 254.

2. PENAL ACTIONS—Reasonable Doubt.—In a penal action the state must assume the burden of proof, but need not show that the offense has been committed beyond a reasonable doubt. Such cases are controlled by the rule of evidence governing civil actions. (Iowa.) *State v. Chicago etc. Ry. Co.*, 254.

PLEADING.

1. PLEADING—Waiver of Defects.—A defect appearing on the face of the complaint can be reached only by demurrer, unless it affects the validity of the cause of action, rendering the complaint insufficient to support the cause of action, and then it can be neither waived nor cured, and can be brought up on motion to arrest judgment or during the trial. All other defects in the complaint can be

waived and are deemed to have been waived unless brought to the attention of the court by demurrer, and unless, if the demurrer is overruled, the defendant declines to plead to the merits. (Mo.) *Jones v. Kansas City etc. R. R. Co.*, 434.

2. PLEADINGS—Amendment.—The doctrine of the relation back of amendments to the commencement of a suit is a fiction of law, and should never be applied when it will operate to cut off a substantial right or defense to new matter introduced by the amendment to the complaint, though connected with the original cause of action. (Ala.) *Nelson v. First Nat. Bank*, 52.

See Judgments, 9, 10; Limitation of Actions; Negligence, 5.

POLICE POWER.

See Constitutional Law.

POSSESSION OF STOLEN GOODS.

See Criminal Law, 10-14.

Note.

Possession of Stolen Property, as evidence of guilt, application of the doctrine to prosecutions for burglary, 482-484, 489.

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POWER OF SALE.

POWERS OF SALE—Intention to Execute.—It is not necessary that the intention to execute a power of sale shall appear by express terms or recitals in the instrument, and it is sufficient, if it appears by words, acts, or deeds, demonstrating such intention, nor is it necessary that the power be referred to, or recited, in the deed of the donee of the power, provided the act of the donee shows that he had in view the subject matter of the power at the time of executing the deed. (Ala.) *Young v. Sheldon*, 44.

See Husband and Wife, 5, 6.

Note.

Presumption as to the place of loss of or injury to goods as between connecting carriers, 393-399.
 of guilt arising from the unexplained possession of recently stolen property, 486-490.

PRINCIPAL AND AGENT.

1. **AGENT, PAYMENT TO—Evidence of the Indebtedness.**—That a person to whom money due another is paid is not in possession of the instrument by which the indebtedness is evidenced, is not conclusive of his authority, or lack of it, to collect the money. (Neb.) *Harrison Nat. Bank v. Austin*, 639.

2. **AGENT, PAYMENT TO—Estoppel of Principal.**—Where a principal has placed his agent in such a position with reference to a note and mortgage that a person of ordinary prudence, conversant with business usages, is justified in presuming him authorized to collect the amount due, payment to him discharges the obligation. (Neb.) *Harrison Nat. Bank v. Austin*, 639.

3. **AGENT, AUTHORITY OF, Inferred from Other Transactions.**—The authority of an agent to do a particular act in connection with a transaction may be inferred from proof that his principal authorized or ratified similar acts in connection with past transactions intrusted to him under similar circumstances. (Neb.) *Harrison Nat. Bank v. Austin*, 639.

PRINCIPAL AND SURETY.

1. **SURETYSHIP—Security for Indemnity.**—A Creditor is Entitled to enforce for his own benefit any securities which the principal debtor has given his surety by way of indemnity. (Neb.) County of Harlan v. Whitney, 610.

2. **SURETYSHIP—Right of Obligee to Assigned Securities.**—If sureties on the bond of a county treasurer assign to the county securities given them by the principal by way of indemnity, the county may enforce them, although the sureties might not have done so without first discharging the obligation. (Neb.) County of Harlan v. Whitney, 610.

3. **SURETYSHIP—Discharge of Security.**—If a person pledges his property as security for the performance of the contract of a third person, the property stands in the position of a surety, and any change in the contract which would have discharged a surety upon the contract will discharge the property pledged as security. (N. H.) Mechanics Nat. Bank v. Comins, 650.

See Appeal and Error, 4; Guaranty.

PROBATE PROCEEDINGS.

See Executors and Administrators.

PROCESS.

1. **PROCESS.**—The Immunity from Service of Civil Process on a witness while attending the trial in another state to give evidence seems to be universally recognized. (Iowa.) Murray v. Wilcox, 263.

2. **PROCESS—Exemption of Party to Action from Service of While Attending Court.**—A nonresident defendant in a criminal prosecution attending the courts of the state for the purpose of his trial is exempt from the service of civil process while coming and departing, as well as while actually in attendance at court. (Iowa.) Murray v. Wilcox, 263.

See Executors and Administrators, 5, 6; Judgments, 2-8; Sunday, 1.

PROHIBITION, WRIT OF.

PROHIBITION, WRIT OF—Office of.—A writ of prohibition can never be made to perform the functions of an appeal or writ of error, and lies only where a court, or tribunal clothed with judicial powers, acts in relation to matters over which it has no jurisdiction, or having jurisdiction over the subject matter, acts in excess of its jurisdiction. (Mo.) Schubach v. McDonald, 452.

PUBLIC OFFICERS.

See Officers.

QUO WARRANTO.

QUO WARRANTO—Municipal Incorporation.—Quo warranto does not lie against a municipal corporation to test the validity of the election under which it was incorporated. (Wash.) State v. South Park, 998.

Note.

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RAILROADS.

1. RAILROAD TRACK—Negligence in Crossing.—One who steps upon a railroad track immediately in front of a train moving at an excessive speed, without giving the customary signals, but visible for the last eight hundred feet of its course, is guilty of contributory negligence, as a matter of law. (Cal.) *Green v. Los Angeles etc. Ry. Co.*, 68.

2. RAILROAD TRACK—Person Crossing.—An Engineer may Assume that a person approaching the railroad is in the possession of her ordinary faculties, and will retain her position of safety and not recklessly expose herself to danger by crossing the track in front of the approaching train. He is not required, therefore, to check the speed of the train to enable her to cross in front of it, nor to ascertain whether she is about to do so; if, after she steps upon the track, he does all in his power to avert an accident, this is all the law requires. (Cal.) *Green v. Los Angeles etc. Ry. Co.*, 68.

3. RAILWAY—Breaking of Cable in Unloading Gravel Train.—In an action against a railway company for injuries sustained by a person, while standing near a depot, through the breaking from its stay ropes of a cable used in unloading a gravel train, evidence of the manner of starting the engine and of the character of the ropes is admissible. (Minn.) *Klugherz v. Chicago etc. Ry. Co.*, 384.

4. RAILROADS—Negligence—Evidence.—Violation by a railroad company of its contract with a town not to run its trains through the streets above a certain speed, is evidence of negligence in an action against it for personal injury to a person upon the street. (N. C.) *Duval v. Atlantic Coast Line R. R. Co.*, 830.

5. STATUTES, PENAL, Construction of.—If a statute is penal in character, it ought not to be construed as fixing a liability where there is no fault. Hence, though a statute declares that all trains upon any railway which intersects or crosses any other railway on the same level shall be brought to a full stop at a distance of not less than two hundred and not more than eight hundred feet from the point of intersection, and that any engineer violating the provisions of the section shall be fined one hundred dollars, and the corporation on whose road the offense is committed two hundred dollars for each offense, neither can be held liable where the failure to stop was due to the brakes not working in the usual manner. (Iowa.) *State v. Chicago etc. Ry. Co.*, 254.

6. CONSTITUTIONAL LAW—Punishing Railway for Act of Engineer.—A statute imposing a penalty on a railway corporation for the failure of its engineer to stop at a crossing is not unconstitutional. It merely exacts of the corporation the duty of seeing that its employé acts in obedience to the statute. (Iowa.) *State v. Chicago etc. Ry. Co.*, 254.

See Carriers; Master and Servant; Municipal Corporations, 7-9; Street Railroads.

RECEIPTS.

See Evidence, 8.

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Receiving Stolen Property, possession of stolen property as evidence of the guilt of the possessor, 484.

REFERENCE.

PRACTICE in Surrogate Courts.—The Report of a Referee appointed in pursuance of section 2546 of the New York code is subject to confirmation, modification or rejection by the surrogate. Such report is not self-executing, and it is both the right and duty of the surrogate to act upon it even after ninety days after it has been submitted to him. (N. Y.) *Matter of Barefield*, 814.

REFORMATION OF INSTRUMENTS.

1. **DEEDS—Reformation of—Knowledge of Mistake.**—If a bill for the reformation of a deed by a subsequent purchaser does not allege want of notice of the mistake, construing it most strongly against the complainant, such purchaser must be held to have known of the mistake at the time of acquiring rights under the conveyance. (Ala.) *Jones v. McNealy*, 38.

2. **DEEDS—Reformation of.**—A purchaser is entitled to his grantor's right to enforce a correction of a description in a prior deed to a part of the premises executed by the grantor to another. (Ala.) *Jones v. McNealy*, 38.

3. **DEEDS—Reformation of—Deeds of Gift.**—The right to the reformation of a deed is not affected by whether it is one of bargain and sale, or of gift. (Ala.) *Jones v. McNealy*, 38.

4. **DEEDS—Reformation—Possession of Premises** by the purchaser is not essential to enable him to obtain correction of a mistake in the description contained in a prior deed to a portion of the premises executed by his grantor to another. (Ala.) *Jones v. McNealy*, 38.

5. **DEEDS—Reformation of Laches.**—Complainant asking the correction of a mistake in a description in a deed is not guilty of laches in bringing suit, if she has been in possession of a portion of the premises to which she has a deed ever since its execution, and her mortgagor and grantor has been in possession of the other portion, and the bill is filed promptly after the defendant, who claims title under the deed containing the mistake, discloses his intention to disturb complainant's possession. (Ala.) *Jones v. McNealy*, 38.

6. **DEEDS—Reformation of—Time of Discovery of Mistake.**—A bill for the correction of a mistake in a deed need not allege when the complainant discovered the mistake, or that a demand or request has been made for its correction. (Ala.) *Jones v. McNealy*, 38.

7. **DEEDS—Reformation of—Demand for.**—A bill for the correction of a mistake in description in a deed need not allege a demand or request of defendant to correct it, when defendant has instituted suit in ejectment against the complainant's tenant. (Ala.) *Jones v. McNealy*, 38.

8. **DEEDS—Reformation of—Relief Granted.**—If a bill presents a case for the correction of a mistake in a deed, the court will grant full relief to the end of foreclosing a mortgage given by defendant to complainant on a portion of the same premises, when the evidence establishes the right to the correction. (Ala.) *Jones v. McNealy*, 38.

RESCUING FROM DANGER.

See Negligence, 7-9.

RES GESTAE.

See Evidence, 6, 7.

RES JUDICATA.

See Judgments, 11, 12.

REVERSAL OF JUDGMENT.

See Appeal and Error, 11-14; Executions, 3, 4.

ROBBERY.

ROBBERY—Indictment—Aggravation.—If an indictment for robbery states the essential facts of the crime, it is not necessary that it further allege circumstances of aggravation in order to warrant the imposition of a penalty provided by statute for the commission of a robbery under aggravated circumstances. (Iowa.) *State v. Poe*, 307.

Note.

Robbery, possession of stolen property as evidence of the guilt of the possessor, 482.

SALES.

SALES—Purchaser With Notice.—A purchaser of a note and mortgage is chargeable with notice of their fraudulent character if enough appears of record to put him upon inquiry which could not have failed to disclose the facts. (Ill.) *Heppe v. Szczepanski*, 221.

See Constitutional Law, 9-12.

SEARCHES AND SEIZURES.

1. UNLAWFUL SEARCH—Consent—Evidence.—If, in an action to recover for searching premises without a warrant, the evidence as to whether the plaintiff and owner gave his consent to the search is conflicting, directing a verdict for defendant is erroneous. (Iowa.) *McClurg v. Brenton*, 323.

2. UNLAWFUL SEARCH by Officer.—A search of a private residence for evidence of crime, without a warrant therefor, cannot be justified, though made by an officer. (Iowa.) *McClurg v. Brenton*, 323.

3. UNLAWFUL SEARCH—Evidence—Use of Hounds.—In an action to recover for an unlawful search, evidence as to the conduct of hounds used to track the thief is admissible only on the question of malice, in mitigation of damages. (Iowa.) *McClurg v. Brenton*, 323.

4. UNLAWFUL SEARCH—Use of Hounds—Evidence.—In an action to recover for an unlawful search of private premises, through the use of hounds, evidence as to their breeding and training, letters indorsing, and stories concerning their ability and usefulness, are not admissible. (Iowa.) *McClurg v. Brenton*, 323.

5. UNLAWFUL SEARCH—Evidence—Photographs of Hounds.—In an action to recover for an unlawful search, photographs of hounds used in making such search are not admissible in evidence. (Iowa.) *McClurg v. Brenton*, 323.

Note.

Search of Premises of Private Persons, constitutional guaranties against, 328, 329.

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SENTENCE.

See Criminal Law, 23.

SERVICE OF PROCESS.

See Process.

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SPECIFIC PERFORMANCE.

1. **CONTRACTS to Convey Land—Breach of Election of Remedies.**—Upon a breach of a contract to convey land, the purchaser may sue for specific performance, and is not bound to bring an action at law for damages. (N. C.) *Rodman v. Robinson*, 877.

2. **SPECIFIC PERFORMANCE—Contract to Convey—Dower Rights.**—A husband cannot avoid a decree for the specific performance of his contract to convey land to which his wife is not a party on the ground that she is entitled to dower in the land. (N. C.) *Rodman v. Robinson*, 877.

3. SPECIFIC PERFORMANCE—Contract to Convey Land.—If no Fraud or Mistake is alleged, the fact that the vendor made a bad trade does not release him from specific performance of his contract to convey land. (N. C.) *Rodman v. Robinson*, 877.

4. SPECIFIC PERFORMANCE—Contract to Convey.—Description of the land by metes and bounds is sufficient in a suit for the specific performance of a contract to convey land. (N. C.) *Rodman v. Robinson*, 877.

SPITE FENCE.

See Constitutional Law, 14.

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STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Construction.

1. STATUTES Borrowed from Other States—Construction.—Courts will not follow the construction given a statute by the court of a state from which such statute is borrowed, when such decision does not appear to be founded on right reasoning. (Mont.) *Ancient Order of Hibernians v. Sparrow*, 563.

Title.

2. CONSTITUTIONAL LAW—Title of Act.—If the title to an act indicates, and the act itself actually embraces, two different objects, diverse in their nature and having no necessary connection, when the constitution says each statute shall embrace but one object, the whole act must be treated as void from the manifest inability of the court to choose between the two, and hold the act valid as to one and void as to the other. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

3. CONSTITUTIONAL LAW—Title to Act.—The generality of the title to an act is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection with it. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

4. CONSTITUTIONAL LAW—Title of Act.—If the legislature is fairly apprised of the general character of an enactment by the

subject expressed in the title, and all its provisions have a just and proper reference thereto, and are such as by the nature of the subject so indicated are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such character, the requirement of the constitution that the title of an act shall embrace but one subject is complied with. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

5. **CONSTITUTIONAL LAW—Title of Act.**—It matters not that an act embraces technically more than one subject, one of which only is expressed in its title, so long as the subjects are not foreign and extraneous to each other, but blend together in the common purpose evidently sought to be accomplished by the act. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

6. **CONSTITUTIONAL LAW—Title to Act.**—If the provisions of a statute all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in its title, they may be united in one act. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

7. **CONSTITUTIONAL LAW—Title to Act.**—Objections should be grave, and the conflict between the constitution and the statute palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject in its title. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

8. **CONSTITUTIONAL LAW—Title of Act.**—However numerous the provisions of an act may be, if they can be, by fair intentment, considered as falling within the subject matter legislated upon in the act, or necessary as ends and means to the attainment of such subject, the act is not in conflict with a constitutional provision that no act shall embrace more than one subject which must be embraced in its title. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

9. **CONSTITUTIONAL LAW—Title of Act.**—A constitutional provision that no act shall embrace more than one subject which shall be expressed in its title is not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

10. **CONSTITUTIONAL LAW—Title to Act—Subject of Act.**—The entire statutory law of the state upon the subject of irrigation and the reclamation of arid lands may be incorporated in a single original or amendatory act under a proper title. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

11. **CONSTITUTIONAL LAW—Consolidation of Statutes by Amendment.**—If two acts have been passed by the legislature on the same general subject, but with differently worded titles, such acts may be amended and combined by one act, with a proper title. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

See Constitutional Law.

STREET RAILROADS.

1. **ELECTRIC RAILROADS—Negligent Speed—Injury to Live-stock.**—Running an electric street-car in the night-time, at a speed in violation of a city ordinance, and so rapidly that it cannot be stopped within the distance a cow is seen, when she comes on the track twenty yards ahead, is negligence, which renders the railroad

company liable for the resulting injury to the cow. (Ala.) *Annis-ton Electrical etc. Co. v. Hewitt*, 42.

2. STREET RAILROADS—Negligence—Passenger in Dangerous Position.—If a street railway company consents to a passenger's taking a dangerous position on its car and knowingly assumes to carry him in that position, it must exercise that high degree of care which the law requires a carrier to observe for the safety of his passengers. The degree of care to be observed by the railway company in such case must be in proportion to the danger which the passenger's perilous position entails. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

3. STREET RAILROADS—Contributory Negligence—Passenger in Dangerous Position.—If a passenger takes a dangerous position on a street-car, even with the consent of the company, he must observe for his own safety the care, proportioned to the apparent danger, that a man of ordinary prudence would observe under like circumstances, and, if he fails in this, and is injured from a cause arising out of, or incident to the position itself, without negligence on the part of the railroad company, it is not liable. Though the company is negligent, still if the passenger fails in such observance of ordinary care, he is guilty of contributory negligence and cannot recover. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

4. STREET RAILROADS—Passenger in Dangerous Position—Refusal to Carry.—A street railroad company has a right to refuse to carry a passenger who takes an unusual and dangerous position on its car. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

5. STREET RAILROADS—Contributory Negligence—Dangerous Position of Passenger.—If a passenger, in boarding a street-car, takes a dangerous position thereon with the knowledge and consent of the railroad company, and thereafter is not guilty of negligence, but is injured through the negligence of the company arising out of a condition which thereafter becomes extrahazardous, he cannot be defeated of his right to recover, on the ground that he was guilty of contributory negligence. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

See Municipal Corporations, 7-9.

SUBROGATION.

SURETYSHIP—Subrogation.—A County, after default in the conditions of the bond of its treasurer, may take advantage of securities given by him to his sureties, either by way of subrogation or by procuring an assignment from the sureties. (Neb.) *County of Harlan v. Whitney*, 610.

See Principal and Surety.

SUMMONS.

See Process.

SUNDAY.

1. LEGAL HOLIDAYS.—Issuance of summons by a clerk of court on Sunday on a complaint filed on that day is merely a ministerial act, and not within the inhibition of a statute prohibiting the

transaction or judicial acts on legal holidays; summons so issued is valid. (Idaho.) *Havens v. Stiles*, 195.

2. SUNDAY CONTRACTS.—A contract for the conveyance of land entered on Sunday is valid and not opposed to public policy. (N. C.) *Rodman v. Robinson*, 877.

SUPPORT.

See Deeds.

SURETYSHIP.

See Principal and Surety.

SURROGATE COURT.

See Reference.

TAXATION.

Constitutional Law.

1. CONSTITUTIONAL LAW—Taxation—Notice to Property Owner, When Required.—Whenever the amount of the taxes to be exacted depends on the judgment or discretion of those fixing the value of the property or the benefits by which such amount is to be measured, an opportunity must be given the property owner to be heard. Hence, if an assessment is authorized for the construction of drainage ditches to be equitably divided among the property owners along or in the vicinity of the improvement and those benefited thereby, and no provision is made for notice to the persons assessed and an opportunity to be heard against the assessment, the statute is unconstitutional as taking property, without due process of law. (Iowa.) *Beebe v. Magoun*, 259.

2. CONSTITUTIONAL LAW—Assessments According to Benefits—Due Process of Law.—If an irrigation law provides for assessments and also the method and means by which benefits received may be adjudicated, it is not unconstitutional as taking private property without due process of law under the guise of taxation or otherwise. (Idaho.) *Pioneer Irrigation Dist. v. Bradley*, 201.

Inheritance Tax.

3. INHERITANCE TAXES—Liability of Foreign Corporations for.—Charitable societies and auxiliaries thereto, incorporated and organized under the laws of other states are not within the provisions of an inheritance tax statute which exempts from the payment of such tax, gifts, bequests, devises, etc., "to or for the use of any institution in said state for purposes of purely public charity, or other exclusively public purposes," and if such foreign corporations are entitled to receive property within the state of such statute, by gift, bequest or devise, they are liable to such inheritance tax, although some of their charitable work and enterprises are carried on within the state. (Ohio St.) *Humphreys v. State*, 888.

4. CONSTITUTIONAL LAW—Inheritance Tax—Foreign Corporations.—A statute of a state imposing an inheritance tax upon foreign charitable corporations operating to some extent within the state as to property received by them therein by gift, bequest, or devise, is not unconstitutional as an unlawful discrimination against them or

as denying them the equal protection of the land. (Ohio St.) *Humphreys v. State*, 888.

Foreclosure of Lien—Unknown Owners.

5. **TAX LIEN—Foreclosure.**—A Description of the Land in a published notice in proceedings to foreclose a tax lien is sufficient where the context shows that property in the state is referred to, and there is but one tract in the state answering the description, although it is equally applicable to another tract in another state. (Neb.) *Leigh v. Green*, 592.

6. **TAXATION—Foreclosure of Tax Lien.**—The Word "Owner," as used in the Nebraska statute providing for the foreclosure of tax liens where the owner is not known, refers to persons having estates in the land, and not to encumbrancers and lienholders. (Neb.) *Leigh v. Green*, 592.

7. **TAXATION.**—The Owner of the Land is Unknown, within the meaning of the Nebraska statute providing for the foreclosure of tax liens, whenever the holder of a tax certificate is unable, with reasonable diligence and inquiry in the neighborhood of the land, to ascertain the whereabouts of the persons appearing to have legal estates therein or to ascertain who have such estates. (Neb.) *Leigh v. Green*, 592.

8. **TAXATION—Affidavit.**—In Proceedings to Foreclose a tax lien under a statute providing therefor when the owner of the land is not known, allegations in the petition and an affidavit for service by publication, on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack. (Neb.) *Leigh v. Green*, 592.

9. **TAXATION—Foreclosure—Parties.**—In a proceeding to foreclose a tax lien under a statute providing therefor when the owner is unknown, the propriety of joining as a party defendant one having an interest in the land short of ownership will not be reviewed collaterally. (Neb.) *Leigh v. Green*, 592.

10. **TAXATION—Proceeding in Rem—Due Process of Law.**—A statute awarding to the purchaser at a tax sale a remedy by suit against the land itself, available whenever the owner is not known, whereby all persons claiming interests in the land may be barred completely on sale under foreclosure, does not deny due process of law. (Neb.) *Leigh v. Green*, 592.

Tax Title.

11. **TAXATION—New Title.**—A sale of land in proceedings to foreclose a tax lien under a statute providing therefor when the owner is unknown, creates a new and independent title and bars all pre-existing interests or liens. (Neb.) *Leigh v. Green*, 592.

12. **TAX DEED—Street Assessment Lien—Superiority.**—A purchaser at a sale for general taxes acquires a title valid as against a lien for a street assessment. (Wash.) *Ballard v. Way*, 993.

13. **REMAINDERMEN—Purchase of Tax Title.**—Remaindermen who have no possession, or right of possession, at the time of a tax sale of the property, may purchase an outstanding tax title for their exclusive benefit as against other remaindermen. (Iowa.) *Crawford v. Meis*, 337.

14. **LIFE TENANTS.**—Purchase of Tax Title by a life tenant does not vest the fee in him as against a remainderman, and the
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transaction amounts simply as a redemption from the tax sale. (Iowa.) *Crawford v. Meis*, 337.

Note.

Taxation, due process of law, what proceedings in aid of may be provided without impairing the right to, 606.

judicial proceedings in aid of, what may be authorized, 606, 607.
proceedings in rem for the enforcement of tax lien or title, 607.

TELEGRAPHS AND TELEPHONES.

1. ACTIONS, When may be Treated as Ex Delicto Though Based on Contracts.—An allegation by the plaintiff of contractual relations with him in an action against a telegraph corporation for the failure to correctly transmit a message does not necessarily make the action one upon contract. These matters may properly be pleaded by way of inducement preliminary to the allegation of facts constituting a tort, and the action may, therefore, be treated as ex delicto rather than ex contractu. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

2. PLEADING, Contributory Negligence, Failure to Negative.—A complaint against a telegraph corporation to recover damages for its negligently failing to transmit a message correctly, need not allege the absence of contributory negligence on the part of the plaintiff, where the statute provides that such a corporation is liable for all mistakes or delays in transmitting or receiving messages over its lines, and that in actions to recover damages thus caused, the burden is on the corporation to prove that the mistake or delay was not due to its negligence. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

3. TELEGRAPH CORPORATIONS.—Damages are Recoverable for Mental Anguish and Suffering resulting from the failure of a telegraph corporation to properly transmit a message. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

4. DAMAGES—Mental Suffering.—The impossibility of providing any exact standard or measure of compensation for injured feelings does not constitute a sufficient reason for refusing to award damages for mental anguish resulting from the incorrect transmission of a telegram. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

5. DAMAGES, When not Limited to the Damages Arising from the Breach of a Contract.—Though the failure of a telegraph corporation to correctly transmit a message is a breach of a contract, the damages to which it is liable are not limited to the plaintiff's damages for such breach. The negligence in the performance of the obligation by which injury resulted to him is a tort, damages for which are not restricted by the rules applicable to ordinary actions for breach of contract. (Iowa.) *Cowan v. Western Union Tel. Co.*, 268.

TENANCY IN COMMON.

COTENANCY—Title to Property as Shown by Records.—When persons take title to land as tenants in common and place it upon record, the act, so far as it may affect purchasers and creditors without notice, must be considered as a declaration by the owners of the character in which they intend to hold the property. (Pa. St.) *Cundey v. Hall*, 938.

Note.

Tenancy in Common, confusion of goods, when created by, 917.

TICKETS.

See **Carriers**; **Injunctions**, 3-7.

TITLE OF ACT.

See **Statutes**.

TRESPASSERS.

See **Negligence**, 10-12.

TRIAL.*Remarks of Court and Counsel.*

1. **TRIAL**.—**Objection to Improper Remarks Made by Counsel** must be made at the time the statement is made, or within a reasonable time thereafter, and must be brought to the attention of such counsel, as well as to that of the court. (N. H.) *Bond v. Bean*, 686.

2. **TRIAL**.—**Comment on Evidence**.—It is reversible error for the court, upon a dispute as to what a witness has testified to upon a material point, to declare in the presence of the jury what such evidence was, and that the stenographer's report thereof is wrong. (Wash.) *State v. Glindemann*, 1001.

Instructions.

See **Criminal Law**, 21, 22.

3. **TRIAL**.—**Instructions**.—It is not error to refuse to give requested instructions already covered by instructions given. (Wash.) *State v. Clark*, 1006.

4. **TRIAL**.—**Denial of Requests for Specific Instructions** is not error when their substance has been embodied in instructions already given. (N. H.) *Bond v. Bean*, 686.

5. **TRIAL**.—**Instructions**.—The fact that an essential element is lacking in one instruction is not ground for a reversal of the judgment, if such element is supplied by other instructions. (Ill.) *Beidler v. King*, 246.

6. **TRIALS**.—**Instructions** may assume as established facts about which there is no dispute. (Mo.) *Parks v. St. Louis etc. Ry. Co.*, 425.

7. **TRIAL**.—**Instruction Given**, stating correct abstract propositions of law, are not ground for reversal of the judgment, unless they intend to mislead the jury. (Ill.) *Beidler v. King*, 246.

8. **TRIAL**.—**Instructions Which are Conflicting** upon a material issue are ground for the reversal of the judgment. (Mont.) *State v. Keerl*, 579.

See **Criminal Law**; **Jury**.

TROVER.

1. **TROVER**.—**Sale of Stock by Broker**.—If a Husband transfers an account with a stock broker from his own to his wife's name, she

if he, without notice to her, sells securities in the account for the husband's debt. (Pa. St.) Sparks v. Hurley, 926.

2. CONVERSION.—Any Intermeddling with Property of Another, or the exercise of dominion over it, whether by the defendant alone, or in connection with others, in denial of the owner's rights, is a conversion, for which trover will lie, though the defendant had not the complete manucaption of the property. (Ala.) Milner etc. Co. v. De Loach etc. Co., 63.

3. TROVER—Defense—Bona Fide Purchaser.—It is no defense to the action of trover that the defendant is a purchaser for value, and without notice of the rights of the real owner. (Ala.) Milner etc. Co. v. De Loach etc. Co., 63.

4. TROVER—Levy of Attachment—Custody of Law.—If the legal title to property, and the right to its immediate possession are in one person, the possession of an officer under an attachment writ against another person is illegal, and the property is not in the custody of the law so as to prevent the real owner from maintaining trover for it against one who purchases it at sale under such attachment. (Ala.) Milner etc. Co. v. De Loach etc. Co., 63.

TRUSTS.

1. TRUST, When not Created by a Deposit in Bank.—If A opens an account in a bank in which he deposits his own money in his name "in trust for B," this does not necessarily create a trust in favor of B, and a court is justified in finding that no trust was thereby created if there is evidence of declarations on the part of B tending to show that he had no interest in the moneys deposited. (N. Y.) Matter of Barefield, 814.

2. TRUSTS.—A Purchase of Trust Property of the Trustee is not necessarily void; the cestui que trust has a right to affirm the sale, and an affirmation will be implied from an unreasonable delay in making an election. (Neb.) Shelby v. Creighton, 630.

See Parties.

Note.

United States, assignment to of a debt barred by the statute of limitations, 183.

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Limitation, statutes of in actions where it is a nominal plaintiff and not the real party in interest, 171.

Limitation, statutes of, what language make applicable against, 164.

statutes of limitation do not affect claims of, 151.

USURY.

1. USURY—Corrupt Intent.—A contract for interest at higher than the legal rate both before and after judgment, without a corrupt intent on the part of the lender to exact an unlawful rate of interest, is not usurious. (Idaho.) Anderson v. Creamery etc. Co., 188.

2. USURY is Matter of Intention, and to avoid a contract it must appear that the lender knew the facts, and acted with a view of evading the law. (Idaho.) Anderson v. Creamery etc. Co., 188.

VENDOR AND VENDEE.

See Deeds; Frauds, Statute of.

WAGES.

See Assignment; Bankruptcy.

WALLS.

See Negligence, 12; Party-walls.

WATERS AND WATERCOURSES.***Appropriation.***

1. **WATERS—Rights of Appropriators.**—If the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted to the source from which the supply is obtained and any interference with the stream by a person having no interest therein, to the damage of the appropriator, is unlawful and actionable. (Utah.) *Cole v. Richards Irr. Co.*, 962.

2. **WATERS—Appropriation—Sources of Supply.**—If lakes form a part of the source of supply of a creek, and with the exception of one of such lakes form a part of the natural channel of one of the tributaries of such creek, prior appropriators of the waters of the creek are entitled to the same usufructuary rights to the waters which naturally flow and collect in such lakes, and which eventually find their way into the main channel, as they have to the balance of the natural flow of creek. (Utah.) *Cole v. Richards Irr. Co.*, 962.

3. **WATERS—Unlawful Interference with.**—A Constitutional provision that "all existing rights to the use of any of the waters of this state for any useful or beneficial purpose are hereby recognized and confirmed," puts it beyond the power of any person to lawfully go upon a stream of water in which he has acquired no right, and interfere with existing rights, or to destroy or cut off the source of supply, of such stream, although it consists of a pond or a lake. (Utah.) *Cole v. Richards Irr. Co.*, 962.

Boundaries when Lake Recedes.

4. **BOUNDARIES Where Water of Lake Recedes.**—When an irregularly shaped, non-navigable lake without outlet or inlet dries up, it is not proper to divide the bed among riparian owners by establishing central points and lines, and extending the side lines of riparian tracts from where they cross the meander line to such points and lines. (Minn.) *Scheifert v. Briegel*, 399.

5. **BOUNDARIES Where Water of Lake Recedes.**—When the waters of a non-navigable lake recede and disappear, each riparian proprietor owns that part of the lake bed included in the triangle made by projecting lines from the points where the side division lines respectively cross the marginal line to the center of the lake; but if the lake is of irregular shape and without outlet or inlet, the inequalities occasioned by the broken shore line should be equitably adjusted between the contiguous owners by disregarding the irregularities, or by treating the lake as composed of separate bodies of water. (Minn.) *Scheifert v. Briegel*, 399.

See Highways, 2.

WAYS.

See Easements.

WEAPONS.

1. **CONSTITUTIONAL LAW**—Carrying Deadly Weapons.—A statute prohibiting private persons from carrying deadly weapons within the limits of any city, town, or village in the state, is unconstitutional and void. (Idaho.) In re Brickey, 215.

2. **CONSTITUTIONAL LAW**—Carrying Deadly Weapons.—A statute prohibiting the carrying of concealed deadly weapons is a proper exercise of the police power, and is valid, but a statute prohibiting the mere carrying of firearms is void, as the right to do so is guaranteed by the state and national constitutions. (Idaho.) In re Brickey, 215.

WILLS.

What is a Will.

1. **WILL, WHAT IS**—Conveyance in Consideration of Support. An oral agreement between a son and his parents that he shall, in consideration of carrying on their business and providing for their support, become vested, upon their death, with the title to the family homestead, is testamentary in character. (Neb.) Teske v. Dittbarn, 614.

2. **WILL, WHAT IS**—The Sole Test by Which to Ascertain whether an instrument or agreement purporting to affect the title to land is testamentary, is to inquire whether it undertakes to vest any present interest to title therein. (Neb.) Teske v. Dittbarn, 614.

Revocation of Will.

3. **WILLS**—Revocation—Fraud Preventing Destruction of Will.—Fraud on the part of the testator's wife, who is sole devisee under his will, in falsely representing to him that it has been destroyed, whereby he is prevented from destroying it or executing another, is not ground for the revocation of such will. (Ky.) Trice v. Shipton, 351.

4. **WILLS**—Revocation.—Courts cannot substitute for the plain requirement of the statute the supposed desire, intention, or even unaccomplished attempt of a testator to destroy or revoke his will. (Ky.) Trice v. Shipton, 351.

See Conversion.

WRIT OF ASSISTANCE.

See Assistance, Writ of.

WRIT OF PROHIBITION.

See Prohibition, Writ of.

X-RAY PICTURES.

See Evidence, 1.

